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Weyerhaeuser NR Company¹ and Association of Western Pulp and Paper Workers, affiliated with the United Brotherhood of Carpenters and Joiners of America and Association of Western Pulp and Paper Workers, affiliated with the United Brotherhood of Carpenters and Joiners of America, Locals 580 and 633. Cases 19–CA–122853, 19–CA–127089, 19–CA–127090, 19–CA–127561, 19–CA–128688, 19–CA–128740, and 19–CA–131148

August 22, 2018

DECISION AND ORDER

BY MEMBERS PEARCE, MCFERRAN, AND EMANUEL

On March 25, 2015, Administrative Law Judge John J. McCarrick issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.²

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,³ and conclusions⁴ only to the extent consistent with this Decision and Order, to amend the remedy section of the judge's decision,⁵ and to adopt the judge's recommended Order as modified and set forth in full below.⁶

¹ The Respondent filed an unopposed motion to amend the caption to reflect its correct legal name, "Weyerhaeuser NR Company." We have amended the caption accordingly.

² Chairman Ring is recused and took no part in the consideration of this case.

³ In the absence of exceptions, we adopt the judge's findings that the Respondent violated Sec. 8(a)(1) by: (1) suspending Steve Collins; (2) denying Steve Collins and Joyce Becker their right to have a union representative present at an investigative interview; and (3) discriminatorily removing prounion commentary from a union-designated bulletin board. Also in the absence of exceptions, we adopt the judge's findings that the Respondent violated Sec. 8(a)(5) by: (1) unilaterally changing the scheduling of trainees in its E&U Department; (2) unreasonably delaying in furnishing Local 580 with some information requested on April 2 and May 1, 2014, and failing to furnish other information requested on those dates; (3) unreasonably delaying in furnishing Local 633 with information requested on April 24 and 30, 2014; and (5) unreasonably delaying in furnishing the union with some information requested on May 1, 2014, and failing to furnish other information requested on that date.

⁴ We have amended the judge's Conclusions of Law 3 and 4 to conform to the violations found by the judge.

⁵ We amend the judge's remedy to require the Respondent to rescind its unlawful unilateral changes to the schedules of its training

I. BACKGROUND

The Respondent operates a pulp and paper mill in Longview, Washington that, among other things, produces food packaging materials. The Charging Party Unions, Association of Western Pulp and Paper Workers, affiliated with the United Brotherhood of Carpenters and Joiners of America, Locals 633 and 580 (Local 633 and Local 580), represent three bargaining units of the Respondent's employees at the Longview facility. Local 633 represents a unit of extruder department employees (the Local 633 extruder unit) and a unit of paperboard employees (the Local 633 paperboard unit). Local 580

operators in the E&U Department, the training evaluation process for E&U Department employees, and the food safety and hygiene rules for extruder unit and paperboard unit employees; to reinstate all unit employees who were discharged as a result of the unlawful changes; and to provide make-whole relief for all unit employees who may have suffered losses as a result of the unlawful changes, to be determined in compliance. To the extent, if any, that employees experienced cessation of employment as a result of the Respondent's application of its unlawful changes, backpay shall be computed in accordance with *F.W. Woolworth*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). For employees who suffered losses but no cessation of employment, backpay shall be computed in the manner set forth in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), with interest as prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra. In accordance with our recent decision in *King Soopers, Inc.*, 364 NLRB No. 93 (2016), enfd. in pertinent part 859 F.3d 23 (D.C. Cir. 2017), we shall order the Respondent to compensate affected employees for their search-for-work and interim employment expenses regardless of whether those expenses exceed interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest as prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra. To the extent that the Respondent maintains that adversely affected unit employees would have been disciplined or discharged even in the absence of its unlawful unilateral changes, the Respondent is entitled to litigate that issue in the compliance proceeding. See, e.g., *Voith Industrial Services, Inc.*, 363 NLRB No. 109, slip op. at 1 fn. 3 (2016); *Uniserv*, 351 NLRB 1361, 1361 fn. 1 (2007). We shall also order the Respondent to remove from its files any reference to unlawful discipline issued to or discharge of any unit employees as a result of the Respondent's unlawful changes, and to notify each of these employees that this has been done and that the discipline or discharge shall not be used against the employee in any way.

In addition, we amend the judge's remedy to provide that Steve Collins be made whole for any loss of earnings and other benefits suffered as a result of his unlawful suspension in accordance with *Ogle Protection Service*, supra, with interest as prescribed in *New Horizons*, supra, and compounded daily as prescribed in *Kentucky River Medical Center*, supra. Further, in accordance with *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016), we shall amend the judge's recommended tax compensation and Social Security reporting remedy.

⁶ We shall modify the judge's recommended Order to conform to the violations found, the Board's standard remedial language, and in accordance with our decision in *Excel Container, Inc.*, 325 NLRB 17 (1997). We shall substitute a new notice to conform to the Order as modified.

represents a unit of utility, maintenance, fiberline, and chip processing employees (the Local 580 unit). As relevant below, the Local 580 unit includes the Respondent's Energy and Utilities Department (E&U Department) employees. Both Charging Parties have been signatories to a series of collective-bargaining agreements with the Respondent.

For 20 years prior to 2013, training evaluations to determine whether the Respondent's E&U Department employees should advance to the next job qualification level were assessed based on necessary job skills agreed to by the Respondent and Local 580. These evaluations were conducted between the employee and his or her supervisor, lasted about 15 to 20 minutes, and involved the supervisor posing questions or hypotheticals for the employee to solve. In fall 2013, without first notifying the Union or giving it an opportunity to bargain, the Respondent's new E&U Department manager changed how the department performed its training evaluations. The employees were now tested on subject matter that had not previously been covered, including safety and environmental issues, and the evaluation sessions lasted up to 14 hours (over multiple sessions) which could take several months to complete. The effect of the extended evaluation process was to delay the movement of employees to the next classification level.

In addition, prior to February 2014, the Respondent had a set of food safety and hygiene rules for the Local 633 extruder and paperboard units that had been in place at the facility since 1987. Under these rules, employees were permitted to drink coffee and beverages and chew tobacco on the production floor and could eat lunch in two of the production area shacks. In February 2014, the Respondent made changes to the food safety and hygiene rules without first notifying the Union and giving it an opportunity to bargain.⁷ Among other things, the Respondent permitted only clear beverages and prohibited chewing tobacco on the production floor. In addition, the Respondent created a new hygiene zone in the paperboard unit where employees could not have personal belongings, food, or beverages other than water. Further, the Respondent added personal item restrictions and grooming standards to the extant hygiene rules for extruder department employees. Finally, the Respondent required the paperboard and extruder unit employees to follow and fill out a cleaning inspection checklist.⁸

⁷ The Respondent does not contend that the new rules were mandated by food safety regulations or other external laws.

⁸ The judge expressly found that the new rules applied to the Local 633 extruder and paperboard departments, and the record supports this finding. However, we note that, in his legal analysis, the judge mistakenly stated that the rules also applied to Local 580.

II. THE JUDGE'S DECISION

The judge found that the training evaluation processes and food safety and hygiene rules are mandatory subjects of bargaining. In addition, the judge found it undisputed that the Respondent made changes to how training evaluations would be conducted and to its food safety and hygiene rules without first providing the Unions with notice and an opportunity to bargain. As such, the judge's analysis focused on the Respondent's defense that it had no obligation to bargain over these changes because the Unions had waived their right to bargain over them either by contract language or inaction. As to the Respondent's changes to the training evaluation processes, the judge found that the collective-bargaining agreement wording relied on by the Respondent did not establish that Local 580 had clearly and unmistakably waived its right to bargain over the method and means of evaluating the E&U Department employees. Turning to the Respondent's argument that Local 580 waived its right to bargain by failing to take any action concerning the changes from October 2013 until April 2014, the judge found that Local 580 could not be found to have waived bargaining over a change that was presented as a *fait accompli*. Regarding the Respondent's changes to the food safety and hygiene rules governing the Local 633 extruder and paperboard unit employees, the judge again found that the collective-bargaining agreement wording relied on by the Respondent did not establish that Local 633 clearly and unmistakably waived its right to bargain over the changes. In addition, he rejected the Respondent's argument that Local 633 waived its right to bargain by inaction because the changes were implemented and presented as a *fait accompli*.

III. ANALYSIS

The Respondent does not dispute the judge's findings that the training evaluation processes and food safety and hygiene rules were mandatory subjects of bargaining.⁹ Nor does it dispute the judge's findings that it made changes to the training evaluation processes and food safety and hygiene rules without first providing the Unions with notice and an opportunity to bargain. Instead, the Respondent argues only that the judge erroneously found that the Unions did not clearly and unmistakably waive their rights to bargain over these matters by con-

⁹ Although the Respondent filed an exception to the judge's finding that the training evaluation processes are mandatory subjects of bargaining, it does not state, either in its exceptions or supporting brief, any grounds on which this purportedly erroneous finding should be overturned. Therefore, in accordance with Sec. 102.46(b)(2) of the Board's Rules and Regulations, we shall disregard this exception. See *Holsum de Puerto Rico, Inc.*, 344 NLRB 694, 694 fn.1 (2005), enf'd. 456 F.3d 265 (1st Cir. 2006).

tract and by inaction. We agree with the judge, for the reasons he states, that the Respondent presented the changes to the training evaluation processes and the food safety and hygiene rules to the Unions as a fait accompli and thus the Unions did not waive their right to bargain by inaction.¹⁰ In addition, we agree with the judge that the Unions did not clearly and unmistakably waive their right to bargain over these matters through contract language, for the reasons discussed below.

The Board's waiver principles are well established. Waiver is not lightly inferred and must be "clear and unmistakable." See *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983); *Georgia Power Co.*, 325 NLRB 420, 420-421 (1998), *enfd.* 176 F.3d 494 (11th Cir. 1999), *cert. denied* 528 U.S. 1061 (1999). The party asserting waiver must establish that the parties "unequivocally and specifically express[ed] their mutual intention to permit unilateral employer action with respect to a particular employment term, notwithstanding the statutory duty to bargain that would otherwise apply." *Provena St. Joseph Medical Center*, 350 NLRB 808, 811 (2007). Such a showing may be based on an express provision in the contract, the conduct of the parties (including past practice, bargaining history, and action or inaction), or a combination of the two. See, e.g., *American Diamond Tool*, 306 NLRB 570, 570 (1992); *Chesapeake & Potomac Telephone Co. v. NLRB*, 687 F.2d 633, 636 (2d Cir. 1982), *enfg.* 259 NLRB 225 (1981). In addition, the party asserting waiver bears the burden of proof. See *TCI of New York*, 301 NLRB 822, 824 (1991).

A. New Training Evaluation Process

In arguing that Local 580 waived its right to bargain over the new training evaluation processes for E&U De-

partment employees, the Respondent points to the collectively bargained "Local Ground Rule No. 48" and a portion of the "Energy & Utilities Design Agreement" (E&U Design Agreement) agreed to by the Respondent and the Union. For the reasons discussed below, we find that these agreements do not establish that Local 580 clearly and unmistakably waived its right to bargain over the training evaluation processes.

1. Local Ground Rule No. 48

The "Pay for Skills" section of Local Ground Rule No. 48 provides:

Work is designed to encourage people to develop and use skills, while safely working within their capability.

Pay structures will be based on broadly defined skills, allowing team members to move easily between tasks with minimal concern for pay issues.

Some component of pay will be based on skill, with increasing pay as additional skills and capabilities are acquired and used.

Processes will be developed to assure that acquired skills are maintained and continuously improved upon. For greater clarity, ID management shall have the right to implement certification requirements where required by law or when recommended by industry standards (e.g. Black Liquor Recovery Boiler Advisory Committee, Factory Mutual). The Company and the Union will jointly develop the means of evaluation.

Each pay level will include elements of leadership, administration, operation, coordination, project management and maintenance.

The new work design will define the advancement process. The minimum qualification levels and performance standards will be determined by mutual agreement between the Company and the Union.

Employees hired into the mill after March 15, 2008 must demonstrate the capability and aptitude to eventually perform all jobs within the work system before being allowed to work in any such system. The Company and the Union shall jointly develop the instruments to be used to measure capability and aptitude through the application of a structured external evaluation tool, such as Work Keys or another mutually agreed to tool.

The judge found that the provision in paragraph 4 stating that "[t]he Company and the Union will jointly de-

¹⁰ As to the food safety and hygiene rules pertaining to employees represented by Local 633, we note the Respondent's argument that it did not present the change as a fait accompli because it trained employees on the new rules prior to implementation and thus Local 633 had an opportunity to request bargaining prior to implementation, but did not. As the judge found, however, the Respondent did not provide the Union with notice or opportunity to request bargaining prior to training employees or implementing the rules. *American Distributing Co. v. NLRB*, 715 F.2d 446, 450, 451 (9th Cir. 1983) ("an employer must give express notice of specific proposals before implementing unilateral changes"), *cert. denied* 466 U.S. 958 (1984).

In addition, we find that the cases relied on by the Respondent to challenge the judge's fait accompli findings are distinguishable as they involve situations where the employer respondents provided the unions with notice of a change and the unions waived the right to bargain by inaction. See *Reynolds Metal Co.*, 310 NLRB 995 (1993); *Haddon Craftsmen*, 300 NLRB 789 (1990), *review denied mem. sub nom. Graphic Communications Workers Local 97B v. NLRB*, 937 F.2d 597 (3d Cir. 1991); and *Kansas National Education Assn.*, 275 NLRB 638 (1985). The Respondent here provided no notice to the Unions prior to implementing the changes.

velop the means of evaluation” suggests that the parties agreed there would be joint decision making with respect to the training evaluation process and thus Local 580 did not clearly and unmistakably waive its right to bargain over the training evaluation processes. In its exceptions, the Respondent asserts that this provision only applies to the evaluation of new skills in connection with the “certification requirements where required by law or when recommended by industry standards,” which are referenced in the preceding sentence, and does not apply to the evaluations at issue here, which are intended to determine employees’ eligibility for higher pay grades. However, this reading ignores the paragraph’s topic sentence, which sets forth the general proposition that “[p]rocesses will be developed to assure that acquired skills are maintained and continuously improved upon.” In light of this language, the sentence that calls for “joint[] develop[ment]” of evaluation procedures may refer broadly to *all* evaluations of new skills. Thus, not only was there no waiver, but the language here suggests that the parties in fact affirmatively agreed to bargain over the training evaluation process. The Respondent has therefore failed to establish that Local 580 clearly and unmistakably waived its right to bargain over the new training evaluation process for E&U Department employees though the ground rule.

The Respondent further argues that, under the “*expressio unius est exclusio alterius*” canon of construction, Local Ground Rule No. 48 constitutes a bargaining waiver.¹¹ The Respondent claims that, because the provision explicitly states the conditions under which Local 580 has the right to bargain over evaluations (i.e., only where the change is mandated by law or recommended by industry standard, or where the evaluation is with respect to a newly hired employee), and because no right to bargain over the training evaluation process at issue here is expressly mentioned, the Board should construe this provision as waiving Local 580’s right to bargain over that process. Without deciding whether the canon of construction advanced by the Respondent could ever be consistent with the Board’s waiver standard, application of the canon does not establish waiver here. As previously discussed, the language of the fourth paragraph of Local Ground Rule No. 48, one of the predicates to the Respondent’s *expressio unius* argument, does not plainly limit, as the Respondent claims, Local 580’s right to bargain over the method of evaluations to only those new skills mandated by law or industry standards. In fact, the

relevant language suggests that Local 580 has broadly reserved its bargaining rights for developing the means and processes for all evaluations.

Based on the foregoing, we find, in agreement with the judge, that nothing in Local Ground Rule No. 48 establishes that Local 580 clearly and unmistakably waived its right to bargain over the Respondent’s changes to the training evaluation processes.

2. The E&U Design Agreement

The E&U Design Agreement between the Respondent and Local 580 is an extensive document covering the Respondent’s energy and utilities employees and addresses topics such as verification of skills and knowledge and pay for skills and knowledge. As relevant here, in a section entitled “Technical Training,” the document states that the Respondent or the Union can approve or veto determinations regarding “[l]evel of skills needed,” “[s]elect/plan training,” the “[g]ap between current and needed skills,” and “[s]chedule training” for energy and utilities employees. However, the document states that only the System Leader, an official of the Respondent, can approve or veto determinations “assess[ing] mastery; verify[ing] learnings” of energy and utilities employees.

The judge found it clear from the E&U Design Agreement that the Respondent and Local 580 contemplated joint decisionmaking with regard to the “level of skills needed,” “select/plan training,” “the gap between current and needed skills,” and scheduling of training for E&U Department employees. The Respondent does not challenge these findings. Instead, it points to the wording in the agreement giving the System Leader authority to “[a]ssess mastery; verify learnings” and to “approve/veto” such determinations.¹² The Respondent argues that this wording establishes that Local 580 has no role in the evaluation process or verifying whether an individual is qualified for a position. We agree with the judge, however, that the wording relied on by the Respondent does not establish that Local 580 clearly and unmistakably waived the right to bargain over extant procedures for how the training evaluation processes are to be conducted. As the judge found, this wording reflects only *who* the parties have agreed will be the person to determine if trainees have acquired the skills necessary

¹¹ *Expressio unius est exclusio alterius* is a principle of legal construction holding that when one or more things of a class are expressly mentioned, others of the same class that are not mentioned are excluded.

¹² In its exceptions, the Respondent also points to testimony by the Unions’ witness that the Respondent had the right to decide whether an employee actually met the qualifications for a promotion. Determining whether one has passed a promotion test, however, is a separate question from who develops the method and processes of testing. Indeed, that the Respondent was granted decisionmaking authority might well explain why the Union wanted to secure a role in determining the testing that provided the basis for the decision.

to advance, not what such qualifications will be or the process by which they will be evaluated. Further, as the judge found, the agreement provides for team decision-making in the “Select/plan training” and “schedule training” categories, and that the “Company/Union” shall have joint authority to approve/veto decisions on selecting, planning, and scheduling training evaluations. This latter language cuts against the Respondent’s argument that the E&U Design Agreement establishes a waiver and, in fact, seems to affirmatively require bargaining over changes to the training evaluation processes. We therefore find, in agreement with the judge, that nothing in the E&U Design Agreement establishes that Local 580 clearly and unmistakably waived its right to bargain over the means of evaluating the E&U Department employees.

B. New Food Safety and Hygiene Rules

The Respondent argues that language from its collective-bargaining agreements with Local 633 authorized its unilateral implementation of the new food safety and hygiene rules for the extruder and paperboard unit employees. The collective-bargaining provision it cites states, in relevant part:

Section 17—Causes for Discipline or Discharge

A. Causes for discipline or discharge are as follows:

13. Refusal to comply with Company Rules:

a. Provided that such rules shall be posted in each department where they may be read by all employees and further, that no changes in present rules or no additional rules shall be made that are inconsistent with this Agreement; and further provided that any existing or new rules or changes in rules may be the subject of discussions between the Local Union Standing Committee and the Local Mill Manager, and in case of disagreement, the procedure for other grievances shall apply.

The judge found that the provision did not clearly and unmistakably give the Respondent the right to formulate new work rules. We agree, for the following reasons.

The first part of Section 17.A.13 states that “no changes in present rules or no additional rules shall be made that are inconsistent with this Agreement[.]” This language effectively establishes a substantive ban on “inconsistent” rules, such that no discipline may be imposed for violations of rules that are inconsistent with the contract. But the mere prohibition against “inconsistent” rules does not clearly and unmistakably indicate the par-

ties’ intent to permit the Respondent to unilaterally implement all other rules, notwithstanding the statutory duty to bargain that would otherwise apply. In fact, the statutory right to bargain over changes that are not inconsistent with the contract can readily coexist with a rule that bars inconsistent changes and allows the Respondent to enforce rules explicitly permitted by the contract or agreed-to in bargaining with Local 633.

The second part of Section 17.A.13 provides for inter-party “discussions” and recourse to grievance procedures when there is disagreement over rules changes. The Respondent contends that by directing any “disagreement” over “changes in rules” to the grievance process, Local 633 has plainly traded away its statutory right to bargain in exchange for an arbitral remedy. However, this interpretation—that Local 633 traded its statutory right to bargain over rules changes in exchange for a grievance-arbitration remedy—is belied by the nature of the alleged trade-off. At best, Section 17.A.13 offers a substantive arbitral remedy for rules that are “inconsistent with” the Agreement. For other rules changes, such as this one, which may involve new rules or changes to the rules that are not necessarily “inconsistent” with the Agreement, the only contractual remedy would be permissive “discussions” between the parties, followed by grievance-arbitration proceedings in which an arbitrator would not be empowered to remedy the rules change. While such a seemingly disproportionate trade-off of statutory bargaining rights for a purely procedural (and substantively toothless) remedy is possible, it should not be inferred lightly, and not at all under a clear-and-unmistakable-waiver standard. Cf. *Rhone-Poulenc Inc. v. International Ins. Co.*, 71 F.3d 1299, 1303 (7th Cir. 1995) (when parties’ trade-offs in a contract appear incommensurate, this may offer “a good clue to what the contract means”).

In arguing that Section 17.A.13 constitutes a waiver of the Union’s right to bargain over the changes to the food safety rules, our dissenting colleague contends that the contractual limitations placed on the Respondent’s disciplinary authority by Section 17.A.13 “necessarily concede” that the Respondent has the authority to create or modify its rules. Our colleague further asserts that a finding of waiver is appropriate because the parties agreed to discussions over new rules or rules changes, and Section 17.A.13, read in light of other contract wording, indicates that the parties did not intend for these discussions to equal bargaining.¹³ In our view, our col-

¹³ Our colleague also contends that the zipper clause, which states that the contract constitutes the parties’ complete agreement, supports a finding of waiver. But it is well-established that such a general statement does not insulate a party’s attempt to execute unilateral changes not addressed in the agreement, without first engaging in bargaining.

league's finding of waiver is premised on assumptions and inferences about what the parties intended that are neither necessary nor compelled by the text. As discussed previously, it is not at all a necessary corollary that a prohibition on rules that are inconsistent with the parties' agreement allows the Respondent to unilaterally impose a wide range of rules that are neither barred nor authorized by the agreement.¹⁴ Moreover, the right which is claimed to be waived here by Local 633 is potentially sweeping and we find it difficult to conclude that the Union would consciously, but silently, waive that right, and thereby consign a wide range of rules changes affecting employees to permissive "discussions" and a toothless grievance procedure.

More fundamentally, the dissent's analysis turns the clear and unmistakable waiver standard on its head. A union is not required to secure a contractual commitment in order to preserve statutory rights. As the Board and courts have made clear time and time again, waiver is not lightly inferred and the burden is on the party claiming the existence of a waiver to establish that the parties "unequivocally and specifically" expressed their mutual intent to permit unilateral employer action. See *Metropolitan Edison Co. v. NLRB*, supra, 460 U.S. at 708; *Provena St. Joseph Medical Center*, supra, 350 NLRB at 811. The Respondent has not met that burden here.

Section 17.A.13 contains no language expressly waiving Local 633's bargaining rights, and the Respondent has offered no evidence that the matter was fully discussed and that Local 633 consciously yielded its interest in the matter. *Allison Corp.*, 330 NLRB 1363, 1365 (2000) ("To meet the "clear and unmistakable" standard, the contract language must be specific, or it must be

shown that the matter claimed to have been waived was fully discussed by the parties and that the party alleged to have waived its rights consciously yielded its interest in the matter."); *American Distributing Co. v. NLRB*, supra, 715 F.2d at 450.

For this reason, we find unpersuasive the Respondent's reliance on *Provena St. Joseph Medical Center*, supra, for the proposition that, where a contract gives an employer the right to act unilaterally, a union's bargaining right has been ceded. The *Provena* case involved provisions *explicitly* stating that the employer had the right to change reporting practices, to make and enforce rules of conduct, and to discipline employees. The Board found that these affirmative statements of management's prerogatives established a penumbral waiver of the right to bargain over a new attendance policy. 350 NLRB at 815. None of the language the Respondent points to here affirmatively states its right to act unilaterally. Rather, Section 17.A.13 merely forbids rules that are inconsistent with the agreement and establishes a grievance-arbitration remedy. There are no affirmative statements of management prerogatives, and thus *Provena* is inapposite.¹⁵

Based on the foregoing, we find that the Respondent has failed to establish that Local 633 waived its right to bargain over the changes to the food safety and hygiene rules for the extruder unit and paperboard unit employees.

AMENDED CONCLUSIONS OF LAW

Substitute the following for Conclusion of Law 3.

3. By engaging in the following conduct, the Respondent committed unfair labor practices in violation of Section 8(a)(5) and (1) of the Act:

(a) Implementing new training evaluation processes for the E&U Department employees without first notifying Local 580 and giving it an opportunity to bargain.

(b) Implementing changes to the food safety and hygiene rules without first notifying Local 633 and giving it an opportunity to bargain.

(c) Implementing changes to the schedules of training operators in the E&U Department without first notifying Local 580 and giving it an opportunity to bargain.

See, e.g., *IMI South, LLC, d/b/a Irving Materials*, 364 NLRB No. 97, slip op. at 3 (2016).

¹⁴ Our dissenting colleague argues that our interpretation of Section 17.A.13—that it prohibits rules "inconsistent with this Agreement," while contemplating bargaining over rules that are neither prohibited nor authorized—renders the provision redundant of the parties' statutory and contractual obligations and thus unnecessary. He argues that the better interpretation is that the provision broadly licenses the Respondent to implement any rules other than those that are inconsistent with the Agreement. Our colleague's criticism misses the mark, however, under the Board's waiver standard. The question here is not whether the Respondent (or our colleague) has offered a plausible interpretation of Section 17.A.13, but rather whether that provision establishes that Local 633 clearly and unmistakably waived its right to bargain over new rules. "The clear and unmistakable waiver standard . . . requires bargaining partners to *unequivocally* and *specifically* express their mutual intention to permit unilateral employer action with respect to a particular employment term, notwithstanding the statutory duty to bargain that would otherwise apply." *Provena St. Joseph Medical Center*, supra, 350 NLRB at 811 (emphasis added.) And, "if a waiver is won—in clear and unmistakable language—the employer's right to take future unilateral action should be apparent to all concerned." *Id.* at 813. The contract language here does not satisfy this standard.

¹⁵ In its exceptions, the Respondent briefly points to the fact that it unilaterally adopted the current food safety rules when it purchased its food packaging operations from another company and retained the seller company's rules without bargaining over them. It claims that this establishes Local 633's acquiescence to its right to make unilateral changes to food safety rules. However, setting initial terms for a newly acquired business unit is generally a purchaser's one-time prerogative and certainly would not establish a continuing right to make unilateral changes. See *301 Holdings, LLC*, 340 NLRB 366, 367–368 (2003).

(d) Refusing to provide and unreasonably delaying in providing the Unions with information relevant and necessary to their function as collective-bargaining representative of bargaining unit employees.

Substitute the following for Conclusion of Law 4.

4. By engaging in the following conduct, the Respondent committed unfair labor practices in violation of Section 8(a)(1) of the Act.

(a) Suspending Steve Collins because he engaged in protected concerted activity.

(b) Denying Steve Collins and Joyce Becker their right to effective union representation in an interview that could have reasonably led to discipline by telling their representative to remain silent.

(c) Discriminatorily removing prounion commentary from a union-designated bulletin board.

ORDER

The National Labor Relations Board orders that the Respondent, Weyerhaeuser NR Company, Longview, Washington, its officers, agents, successors, and assigns shall

1. Cease and desist from

(a) Implementing new training evaluation processes for the E&U Department employees without first notifying Carpenters Local 580 and giving it an opportunity to bargain.

(b) Implementing changes to the food safety and hygiene rules for extruder unit and paperboard unit employees without first notifying Carpenters Local 633 and giving it an opportunity to bargain.

(c) Implementing changes to the hours of training operators in the E&U Department without first notifying Carpenters Local 580 and giving it an opportunity to bargain.

(d) Refusing to bargain collectively with Carpenters Local 580 by unreasonably delaying in furnishing and failing and refusing to furnish it with information requested on April 2, 2014 and May 1, 2014 that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of the Respondent's unit employees.

(e) Refusing to bargain collectively with Carpenters Local 633 by unreasonably delaying in furnishing it with information requested on April 24, 2014 and April 30, 2014 that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of the Respondent's unit employees.

(f) Suspending Steve Collins because he engaged in protected concerted activity.

(g) Denying employees the right to effective union representation in interviews that could reasonably lead to

discipline by telling the union representative to remain silent.

(h) Discriminatorily removing prounion commentary from a union-designated bulletin board.

(i) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with Carpenters Local 580 as the exclusive collective-bargaining representative of employees in the following bargaining unit:

All employees of Respondent working at its Longview facility, except those employees in Respondent's extruder, paperboard, shipping, L3 paper machine, and L3 technical departments, and those employees engaged in administration, actual supervision, watchman duties, sales, engineering and drafting, research and technical occupations requiring professional training, accounting, clerical, stenographic and other office work. Also excluded are guards, supervisors, and professional employees as defined in the Act.

(b) Before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with Carpenters Local 633 as the exclusive collective-bargaining representative of employees in the following bargaining units:

All employees of Respondent at its Longview, Washington extruder operation, except those employees engaged in administration, actual supervision, watchman duties, sales, engineering and drafting, research and technical occupations requiring professional training, accounting, office clerical and guards, supervisors, and professional employees as defined in the Act.

All employees of Respondent working in its paperboard, shipping, L3 paper machine, and L3 technical departments at its Longview facility, except those engaged in administration, actual supervision, watchman duties, sales, engineering and drafting, research and technical occupations requiring professional training, accounting, clerical, stenographic and other clerical work. Also excluded are guards, supervisors, and professional employees as defined in the Act.

(c) Rescind and cease giving effect to the unilaterally implemented changes to the training evaluation processes for E&U Department employees, food safety and hygiene rules for the extruder unit and paperboard unit em-

employees, and hours of training operators in the E&U Department.

(d) Within 14 days from the date of this Order, offer any and all unit employees discharged as a result of the unilateral changes in the training evaluation processes for E&U Department employees, food safety and hygiene rules for the extruder unit and paperboard unit employees, and hours of training operators in the E&U Department reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(e) Make any affected unit employees whole for any loss of earnings or benefits they may have suffered as a result of the unilaterally implemented changes to the training evaluation processes for E&U Department employees, the food safety and hygiene rules for the extruder unit and paperboard unit employees, and the hours of the training operators in the E&U Department, in the manner set forth in this decision.

(f) Compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 19, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

(g) Within 14 days of the date of this Order, remove from its files any reference to discipline and/or discharge imposed on unit employees as a result of the unilaterally implemented changes to the training evaluation processes for E&U Department employees, the food safety and hygiene rules for the extruder unit and paperboard unit employees, and the hours of training operators in the E&U Department, and within 3 days thereafter notify each affected employee in writing that this has been done and that any such discipline or discharge will not be used against the employee in any way.

(h) To the extent not already provided, furnish the Unions with the information they requested on April 2, 24, and 30, 2014, and May 1, 2014.

(i) Make Steve Collins whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the judge's decision as amended in this decision.

(j) Compensate Steve Collins for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 19, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allo-

cating the backpay award to the appropriate calendar years.

(k) Within 14 days from the date of this Order, remove from its files any reference to the unlawful suspension of Steve Collins, and within 3 days thereafter, notify him in writing that this has been done and that the suspension will not be used against him in any way.

(l) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(m) Permit employees to have effective representation by a union representative at interviews that they reasonably believe might result in disciplinary action against them.

(n) Within 14 days after service by the Region, post at its Longview, Washington facility copies of the attached notice marked "Appendix."¹⁶ Copies of the notice, on forms provided by the Regional Director for Region 19, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 2013.

(o) Within 21 days after service by the Region, file with the Regional Director for Region 19 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. August 22, 2018

¹⁶ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Mark Gaston Pearce, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER EMANUEL, concurring in part and dissenting in part.

I join my colleagues in finding that the Respondent violated Section 8(a)(5) and (1) of the National Labor Relations Act (NLRA or Act) by implementing new training evaluation processes without first notifying Local 580 and giving it an opportunity to bargain. Applying the Board's existing standard for evaluating a contractual defense to a refusal to bargain, the Respondent did not demonstrate that Local 580 clearly and unmistakably waived its bargaining rights based on the collective-bargaining agreement. Contrary to the judge and my colleagues, however, I would dismiss the allegation that the Respondent violated Section 8(a)(5) and (1) by unilaterally changing its food safety rules. The Respondent's collective-bargaining agreement with Local 633 did clearly and unmistakably waive the Union's right to bargain over the implementation of new food safety rules, and therefore, the Respondent did not violate the Act by implementing those rules without bargaining.

The Respondent asserts that language in its contract with Local 580 clearly and unmistakably waived the Union's right to bargain over the training evaluation processes. I join my colleagues' conclusion that the language cited by the Respondent is simply too ambiguous to establish a clear and unmistakable waiver. See *Provena St. Joseph Medical Center*, 350 NLRB 808 (2007) (setting forth the clear and unmistakable waiver standard); see also *Metropolitan Edison Co. v. NLRB*, 460 US 693 (1983) (same). I write separately to note that multiple circuit courts have criticized the Board's continued use of the "clear and unmistakable waiver" standard and have instead adopted a "contract coverage" analysis to contractual defenses to refusal to bargain allegations. *NLRB v. Postal Service*, 8 F.3d 832 (D.C. Cir. 1993) (adopting a contract coverage analysis); *Chicago Tribune v. NLRB*, 974 F.2d 933 (7th Cir. 1992) (same); see also *Bath Marine Draftsmen's Assn. v. NLRB*, 475 F.3d 14 (1st Cir. 2007) (adopting the D.C. Circuit's contract coverage analysis and finding that the employer did not violate the Act where its interpretation of the contract had a "sound arguable basis"). Pursuant to the contract cover-

age analysis, when a union and employer bargain over a subject and memorialize their agreement in the contract, "there is no continuous duty to bargain during the term of an agreement" since the contract demonstrates that the parties have already fulfilled their duty to bargain and created "a set of rules governing their future relations." *NLRB v. Postal Service*, 8 F.3d at 836-37. Under a contract coverage analysis, then, the present dispute would be resolved by interpreting the contractual language, including consideration of the Respondent's argument based on the "expressio unius est exclusio alterius" canon of construction. *Id.* at 837. Nevertheless, since the Respondent has not argued that the contract coverage analysis applies, I will not apply it. I favor revisiting whether the Board should adopt the contract coverage analysis in a future appropriate case.

I dissent, however, from my colleagues' conclusion that Local 633 did not clearly and unmistakably waive its right to bargain over the changes to food safety rules. To the contrary, Section 17.A.13 clearly and unmistakably indicates that Local 633 has given the Respondent the contractual right to create and implement new work rules, subject to certain limitations.

Section 17.A.13, quoted in full by my colleagues above, forthrightly authorizes the Respondent to craft and implement new or modified work rules. Indeed, the entire import of Section 17.A.13 is premised on this authority. Section 17.A.13 first notes that the Respondent may discipline employees for "refusal to comply with Company rules." Section 17.A.13 then places key limitations on the Respondent's ability to discipline employees when new rules are implemented or existing rules modified. First, the rules must be "posted in each department," ensuring employees procedural fairness by providing adequate notice before discipline. Second, "no changes in present rules or additional rules shall be made that are inconsistent with this Agreement," ensuring employees substantive fairness by guaranteeing that no discipline will contravene the rights in the contract. Both of these provisions explicitly limit the Respondent's authority to impose discipline based on new or modified rules. Such contractual limitations on the Respondent's discipline authority necessarily concede that the Respondent has the authority to create or modify its rules.

Section 17.A.13's third limitation on the Respondent's authority to discipline pursuant to work rules, namely "that any existing or new rules or changes in rules may be the subject of discussions . . . and in case of disagreement" may be grieved, further buttresses the case for clear and unmistakable waiver as to the food safety rules. The language indicates that disagreements regarding work rules may be the subject of "discussions." The

“discussions” anticipated by the contract cannot be equated with mandatory “bargaining” regarding new or modified rules, precisely because such discussions apply to “any existing” rules already bargained for and memorialized in the contract, not just rule changes (emphasis added). Rather, this language indicates that the Union’s remedy for dissatisfaction with the Respondent’s exercise of its contractual authority pertaining to any rules—either the implementation of new rules or the administration of existing rules—is the contract’s grievance procedures. Furthermore, Local 633 and the Respondent have a long history of collective bargaining and no doubt are well aware that the word “bargaining” is a term of art, with a meaning distinct from the more general “discussions.” Section 32.B of the contract demonstrates the parties’ precise use of the term, stating “it is agreed that this document contains the full and complete agreement on all *bargaining* issues . . . and no party shall be required during the term of this Agreement to negotiate or *bargain* upon any issue” (emphasis added). Section 32.B also, of course, strengthens the case that the Union waived its right to bargain over the implementation of new work rules. *TCI of New York*, 301 NLRB 822 (1991) (the presence of a “zipper” clause does not necessarily establish waiver, but may evidence waiver under all the circumstances of the case); see also *Provena St. Joseph Medical Center*, 350 NLRB at 815 (reading several provisions of the contract together to find waiver).

My colleagues correctly note that “[a] union is not required to secure a contractual commitment in order to preserve statutory rights.” Yet, my colleagues also conclude that Section 17.A.13 exists only to reinforce this statutory right to bargain or to allow the Respondent to enforce the rules presently contained in the contract. Thus, under the majority’s reading of Section 17.A.13, it is wholly unnecessary to the contract. To the extent that my finding of waiver is, as my colleagues suggest, “premised on assumptions and inferences about what the parties intended,” I do indeed assume that the parties intend contractual language to be given a reasonable meaning, and I infer that a reasonable meaning would not render Section 17.A.13 to be redundant and therefore unnecessary. A collective-bargaining agreement neither needs to reiterate the requirements of the Act for those requirements to bind it, nor does it need to repeat that it intends its provisions to be enforceable to render them so. I therefore conclude that when Section 17.A.13 lists both procedural and substantive limitations on new work rules that may be implemented during the term of the agreement, the parties affirmatively concede that the Respondent may implement new rules subject to these procedural and substantive limitations.

In sum, Section 17.A.13 defines parameters for the Respondent’s authority to discipline pursuant to work rules, including new work rules. In so doing, it demonstrates that the Respondent has the authority to implement these new rules. Accordingly, I would dismiss the allegation that the Respondent violated Section 8(a)(5) and (1) by unilaterally implementing the food safety rules.

Dated, Washington, D.C. August 22, 2018

William J. Emanuel,

Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT implement new training evaluation processes for the E&U Department employees without first notifying Association of Western Pulp and Paper Workers, affiliated with the United Brotherhood of Carpenters and Joiners of America, Local 580 (Carpenters Local 580) and giving it an opportunity to bargain.

WE WILL NOT implement changes to the food safety and hygiene rules for extruder unit and paperboard unit employees without first notifying Association of Western Pulp and Paper Workers, affiliated with the United Brotherhood of Carpenters and Joiners of America, Local 633 (Carpenters Local 633) and giving it an opportunity to bargain.

WE WILL NOT implement changes to the hours of the training operators in the E&U Department without first notifying Carpenters Local 580 and giving it an opportunity to bargain.

WE WILL NOT refuse to bargain collectively with Carpenters Local 580 by unreasonably delaying in furnishing and failing and refusing to furnish it with information requested on April 2, 2014 and May 1, 2014 that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of our unit employees.

WE WILL NOT refuse to bargain collectively with Carpenters Local 633 by unreasonably delaying in furnishing it with information requested on April 24, 2014 and April 30, 2014 that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of our unit employees.

WE WILL NOT suspend employees because they engage in protected concerted activity.

WE WILL NOT deny employees the right to effective union representation in interviews that could reasonably lead to discipline by telling the union representative to remain silent.

WE WILL NOT discriminatorily remove pro-union commentary from a union-designated bulletin board.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with Carpenters Local 580 as the exclusive collective-bargaining representative of employees in the following bargaining unit:

All of our employees working at our Longview, Washington facility, except those employees in the extruder, paperboard, shipping, L3 paper machine, and L3 technical departments, and those employees engaged in administration, actual supervision, watchman duties, sales, engineering and drafting, research and technical occupations requiring professional training, accounting, clerical, stenographic and other office work. Also excluded are guards, supervisors, and professional employees as defined in the Act.

WE WILL, before implementing any changes in wages, hours, or other terms and conditions of employment of unit employees, notify and, on request, bargain with Carpenters Local 633 as the exclusive collective-bargaining representative of employees in the following bargaining units:

All of our employees at our Longview, Washington extruder operation, except those employees engaged in administration, actual supervision, watchman duties, sales, engineering and drafting, research and technical occupations requiring professional training, accounting,

office clerical and guards, supervisors, and professional employees as defined in the Act.

All of our employees working in the paperboard, shipping, L3 paper machine, and L3 technical departments at our Longview, Washington facility, except those engaged in administration, actual supervision, watchman duties, sales, engineering and drafting, research and technical occupations requiring professional training, accounting, clerical, stenographic and other clerical work. Also excluded are guards, supervisors, and professional employees as defined in the Act.

WE WILL rescind and cease giving effect to the unlawful unilateral changes that we made to the training evaluation processes for E&U Department employees, food safety and hygiene rules for the extruder unit and paperboard unit employees, and hours of training operators in the E&U Department.

WE WILL, within 14 days from the date of the Board's Order, offer any and all unit employees discharged as a result of the unlawful unilateral changes to the training evaluation processes for E&U Department employees, food safety and hygiene rules for the extruder unit and paperboard unit employees, and hours of training operators in the E&U Department reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make any affected unit employees whole, with interest, for any loss of earnings or benefits they may have suffered as a result of the unlawful unilateral changes to the training evaluation processes for E&U Department employees, the food safety and hygiene rules for the extruder and paperboard unit employees, and the hours of the training operators in the E&U Department.

WE WILL, within 14 days of the date of the Board's Order, remove from our files any reference to discipline and/or discharge imposed on unit employees as a result of the unlawful unilateral changes to the training evaluation processes for E&U Department employees, the food safety and hygiene rules for the extruder and paperboard unit employees, and the hours of training operators in the E&U Department, and WE WILL, within 3 days thereafter notify each affected employee in writing that this has been done and that any such discipline or discharge will not be used against the employee in any way.

WE WILL compensate affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file with the Regional Director for Region 19, within 21 days of the date the amount of backpay is fixed, either by agreement or

Board order, a report allocating the backpay award to the appropriate calendar years.

WE WILL, to the extent not already provided, furnish the Unions with the information they requested on April 2, 24, and 30, 2014, and May 1, 2014.

WE WILL make Steve Collins whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, less any net interim earnings, plus interest.

WE WILL compensate Steve Collins for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file with the Regional Director for Region 19, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful suspension Steve Collins, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the suspension will not be used against him in any way.

WE WILL permit employees to have effective representation by a union representative at interviews that they reasonably believe might result in disciplinary action against them.

WEYERHAEUSER NR COMPANY

The Board's decision can be found at <http://www.nlr.gov/case/19-CA-122853> or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



Susannah C. Merritt, Esq., for the General Counsel.
Richard N. VanCleave, Esq. (VanCleave & Cobrain), of Sherwood, Oregon, for the Respondent.
Paul Cloer, Organizing Coordinator, of Portland, Oregon, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JOHN J. MCCARRICK, Administrative Law Judge. This case was tried in Portland, Oregon, from December 2 through 5,

2014, upon the order consolidating cases, consolidated complaint, and notice of hearing issued on August 22, 2014, by the Regional Director for Region 19.

The complaint alleges that Weyerhaeuser Company, Respondent, violated Section 8(a)(1) of the Act by disciplining employee Steve Collins for engaging in what Respondent believed were protected-concerted activities, by limiting the ability of employees' union representatives from participating in a disciplinary interview, and by removing a union communication from the Union's bulletin board.

The complaint further alleges that Respondent violated section 8(a)(5) and (1) of the Act by making unilateral changes to its practice of how it performs training evaluations, by unilaterally implementing new rules related to food safety, by unilaterally changing its practice of scheduling the training of operators in the Energy and Utility Department, and by refusing to furnish information or refusing to furnish information in a timely manner requested by the Union necessary and relevant to its duties as exclusive collective-bargaining representative.

FINDINGS OF FACT

Upon the entire record herein, including the briefs from counsel for the General Counsel and Respondent, I make the following findings of fact.

I. JURISDICTION

Respondent admitted and I find that is a State of Washington corporation located in Federal Way, Washington, and with a facility located in Longview, Washington, where it operates a paper and pulp mill. In the operation of the paper and pulp mill, during the last 12 months, Respondent has derived gross revenues in excess of \$500,000 and has purchased goods and services valued in excess of \$50,000 directly from points outside the State of Washington. Respondent further admitted and I find that it is an employer engaged in interstate commerce within the meaning of Sections 2(2), (6), and (7) of the Act and a healthcare institution within the meaning of Section 2(14) of the Act.

II. LABOR ORGANIZATION

Respondent admitted and I find that Association of Western Pulp and Paper Workers, affiliated with the United Brotherhood of Carpenters and Joiners of America (AWPPA) and its Locals 580 and 633 (Unions) are labor organizations within the meaning of Section 2(5) of the Act. The Union's representatives relevant in this case include

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. Background facts

Respondent and the Unions have a long history of collective bargaining at Respondent's Longview, Washington paper and pulp mill. The Unions represent Respondent's employees in three discreet bargaining units.

Local 633 represents a unit of Respondent's 75 extruders (extruder unit) including:

All employees of Respondent at its Longview, Washington extruder operation, except those employees engaged in administration, actual supervision, watchman duties, sales, engi-

neering and drafting, research and technical occupations requiring professional training, accounting, office clerical and guards, supervisors, and professional employees as defined in the Act.

The extruder department laminates polyethylene onto paperboard which is then shipped to the Company's customers who convert the product into individual drink containers. The parties have been signatory to a series of collective-bargaining agreements, for this bargaining unit, the most recent being effective from April 5, 2013–2019.

Local 633 also represents a unit of Respondent's 125 paperboard employees (paperboard unit) including:

All employees of Respondent working in its paperboard, shipping, L 3 paper machine, and L 3 technical departments at its Longview facility, except those engaged in administration, actual supervision, watchman duties, sales, engineering and drafting, research and technical occupations requiring professional training, accounting, clerical, stenographic and other clerical work. Also excluded are guards, supervisors, and professional employees as defined in the Act.

The paperboard unit includes the paper machine (identified as L3) which produces paperboard stock, and includes the paperboard shipping department and the technical department. The parties have been signatory to a series of collective-bargaining agreements, the most recent being effective March 15, 2007, through March 14, 2014. This agreement was extended by the parties through June 1, 2014.

Local 580 represents a unit of Respondent's 250 energy and utility, maintenance, fiberline, and chip processing employees (Local 580 unit) including:

All employees of Respondent at its Longview facility, except those employees in Respondents extruder, paperboard, shipping, L 3 paper machine, L 3 technical departments, and those employees engaged in administration, actual supervision, watchman duties, sales, engineering and drafting, research and technical occupations requiring professional training, accounting, stenographic and other clerical work. Also excluded are guards, supervisors, and professional employees as defined in the Act.

The Local 580 unit includes the Chips, Fiberline, Energy and Utilities (E & U), and maintenance departments. The parties have been signatory to a series of collective-bargaining agreements, the most recent being effective March 15, 2007, through March 14, 2014. This agreement was extended by the parties through June 1, 2014.

Employees in the Local 580 unit and the paperboard units ratified their respective successor collective-bargaining agreements in August 2014. At the time of the hearing the new collective-bargaining agreements for these units had not been printed, but any changes from the parties' previous collective-bargaining agreements have been ratified by the units and are contained in Respondent's best and final proposal.¹

Respondent's liquid packaging board product is subject to regulation by the United States Food and Drug Administration

(FDA). Respondent is audited annually by the FDA and is required to provide documentation to its customers that the products comply with the FDA standards. Respondent admitted and I find that its management team of human resource manager, Diane Zolotko (Zolotko), extruder department manager, Matt Warthen (Warthen), assistant to the human resources director, Terri Hurley (Hurley), team development manager (TDM), Art Calhoun (Calhoun), energy and utilities manager, Assaad Alsemaan (Alseman), shift supervisor, Miles Ambergey (Ambergey), paper machines superintendent, Tim Edwards (Edwards), central services superintendent, David Kay (Kay), and Supervisor John Stroburg (Stroberg) are supervisors and agents within the meaning of the Act.

Since the alleged violations do not occur in any pattern or chronological order, I will discuss them in the order in which they appear in the complaint.

B. The 8(a)(1) allegations

The discipline of Steve Collins

Complaint paragraph 8 alleges that Respondent violated section 8(a)(1) of the Act in issuing its employee Steve Collins a 3 day suspension because it believed he engaged in protected concerted activity.

a. The facts

Steve Collins has been employed by Respondent as an operator and has worked in its extruder department for the past 37 years. In his testimony Collins explained that Respondent's extruder department was sold to Tetra Pak in 1993. Tetra Pak owned and operated the extruder department for about 17 years, then sold it back to Respondent in 2010. Collins' supervisors are TDMs Calhoun, Amburgey, Richard Hart (Hart), and Steve Queckboerner (Queckboerner). The TDMs are supervised by extruder department General Manager Warthen. Collins was a shop steward for the extruder unit for about 2 years, about 8 years ago.

On January 27, 2014, Collins un rebutted and credited testimony is that he wrote a sign on a piece of milk carton paper with a felt pen that stated, "Please Buy Us Back!!! Tetra Pak."² The sign was about 18 by 20 inches. No one else was present when Collins made the sign. After writing the sign, Collins leaned it on the front of his console in the operator's shack, so that it was visible to anyone walking by.³ Collins said he made the sign as a joke because he had heard that Tetra Pak officials were coming through his department and he wished he could have stayed with Tetra Pak, because he was dissatisfied with Weyerhaeuser management. According to Collins he did not expect that anyone from Tetra Pak would actually see his sign.

On January 27, 2014, at about 4:30 supervisory TDM Calhoun went to Collins in the break shack and asked him if he made the above sign. Collins said, "On the grounds that it might incriminate me, I can't answer that question." Calhoun replied, "Does that mean 'no'?" Collins responded, "No, on the grounds that it could incriminate me, that means I can't answer." Calhoun again asked Collins if he meant that he did not

¹ GC Exh. 5.

² GC Exh. 46.

³ ALJ Exh. 1.

make the sign, to which Collins responded, “No, Art, that means yes, I did do it.”⁴ Five minutes later, Calhoun came back and told Collins to get a shop steward for a meeting to be held in General Manager Warthen’s office.

A fact finding meeting was conducted at the end of Collins’ shift on January 27 and another on February 13, 2014, that are discussed below.

After conducting the fact finding interviews, on March 24, 2014, General Manager Warthen called Collins into his office and issued him a 3-day suspension for dishonesty and insubordination due to not answering the questions from the fact finding honestly. The suspension letter⁵ states in pertinent part:

....

Upon first glance at the poster, the company noticed that there were different hand writings represented. The words “Buy us Back!” were in a female’s handwriting. “Tetra Pak” and the middle exclamation mark were in a man’s handwriting and the final exclamation mark was written in what appeared to be a man’s handwriting.

February 13th a second fact finding meeting was conducted with you and your Union Representative, Jeff McGlone, to provide you a second opportunity to be truthful regarding the three people who participated in writing the poster. During this meeting, you shared that you had written the final exclamation mark, but someone else had filled it in with the heavy felt pen markings. So at this meeting you identified that there were, in fact, at least two employees who participated in writing the sign.

When asked did you write the word “Tetra” on this poster? You responded “Yes.” When asked if you wrote the word “Pak” on this sign, you responded “Um huh.” When asked if you wrote the exclamation mark in the middle on the poster, you replied “Um huh.” When asked if you wrote the exclamation mark to the far right on the poster, you answered “Yes.” The Company has determined these answers to be truthful based on your handwriting.

When asked, did you write the word, “Please” on the poster, you responded, “Yes”. When asked, did you write the word “Buy” on the poster, you responded, “Yes”. When asked, did you write “Us” on the poster, you responded, “Yes.” When asked, did you write the word “Back” on this poster, you responded “Um huh.” When asked did you write the exclamation mark on the left of the poster, you responded “Yes”. When asked, did you write the phrase “Please Buy Us Back!” you softly responded, “Yes”. The Company had determined these answers to be untruthful based on your handwriting and the handwriting of a female who matches the handwriting on the poster.

Upon review of the facts, it is determined that you have violated the collective bargaining agreement specifically Section 16: Causes for Discipline or Discharge; subsection 7 dishonesty. Further, you were insubordinate due to not answering

the questions honestly as you were instructed to do.

It appears you are willing to “take one for the team.” Unfortunately, your teammates were unwilling to come forward to take ownership in their part of the sign. Since you are all in stated or non-stated agreement, that you should take full blame, you are hereby issued a 3-day suspension, on a non-precedent setting basis, as a reminder for you to understand that we are in business because of our valued customers. . . . Additionally, being dishonest and insubordinate during fact findings will not be tolerated.

Warthen told Collins he would be suspended for 3 days without pay and had supervisory TDM Queckboerner escort him to his car.

b. The analysis

Counsel for the General Counsel contends that Respondent violated Section 8(a)(1) of the Act when it suspended Collins in retaliation for what it believed was his protected concerted activity of writing and displaying the Tetra Pak sign.

Respondent argues that there is not a scintilla of evidence to support the allegation that Respondent believed Collins engaged in protected concerted activity. Respondent further contends that the sign was not protected activity and the complaint was directed at a third party and disparaged Respondent, citing *NLRB v. IBEW Local 1229 (Jefferson Standard Broadcasting)*, 346 U.S. 464 (1953), and *Elko General Hospital*, 347 NLRB 1425 (2006).

Usually employee activity is concerted when it is “engaged in with or on the authority of other employees,” and a respondent violates Section 8(a)(1) of the Act if, having knowledge of an employee’s concerted activity, it takes adverse employment action that is “motivated by the employee’s protected concerted activity.” *Meyers Industries (Meyers I)*, 268 NLRB 493, 497 (1984). However, even in the absence of concert by employees, an employer’s mistaken belief that an employee engaged in protected concerted activity is controlling. *CGLM, Inc.*, 350 NLRB 974, 979–980 (2007), citing *Henning & Cheadle*, 212 NLRB 776, 777 (1974).

To be protected under Section 7 of the Act, employee activity must be pursued for union related purposes or for other mutual aid or protection. The Board has long held that employee activity may be protected where there is an appeal about working conditions to outside agencies, including where an employee sent a letter to his employer’s client critical of the employer. *M.V.M., Inc.*, 352 NLRB 1165, 1172 (2008). Activities including sending emails to fellow employees about working conditions have been found to be protected. *Timekeeping Systems, Inc.*, 323 NLRB 244 (1997).

In analyzing alleged discriminatory conduct for engaging in protected concerted activity the test is the same as for violations of Section 8(a)(3) of the Act. In mixed motive cases, under *Wright Line*, 251 NLRB 1083 (1980), *enfd.*, 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982), the General Counsel has the burden of proving by a preponderance of the evidence that animus against protected conduct was a motivating factor in the adverse employment action. If the General Counsel makes a showing of discriminatory motivation by proving protected activity, the employer’s knowledge of that

⁴ Tr. p. 251, line 25 to p. 252, line 19.

⁵ GC Exh. 47.

activity, and animus against protected activity, then the burden of persuasion shifts to the employer to prove that it would have taken the same action even in the absence of the protected activity.

The Board has inferred unlawful motive where the employer's action is "baseless, unreasonable, or so contrived as to raise a presumption of unlawful motive." *Montgomery Ward*, 316 NLRB 1248, 1253; *ADS Electric Co.*, 339 NLRB 1020, 1023 (2003); *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966); and *J.S. Troup Electric*, 344 NLRB 1009, 1015 (2005).

Where the employer's defense is found to be pretextual, the employer fails to establish that it would have disciplined the employee for a lawful, nondiscriminatory reason. *Aero Metal Forms*, 310 NLRB 397, 399 fn.14 (1993). A pretextual reason supports an inference of an unlawful one. *Keller Mfg Co.*, 237 NLRB 712, 717 (1978). Moreover, in the case of pretext there is no mixed motive and the *Wright Line* test does not apply.

In the instant case, I find that Collins engaged in what Respondent believed was concerted activity. Contrary to Respondent's assertion that there is no evidence that Respondent believed Collins engaged in protected concerted activity, the language of Respondent's suspension letter reflects that it believed that Collins had engaged in concerted activity when he made the Tetra Pak sign. As the suspension letter recites: "It appears you are willing to 'take one for the team.' Unfortunately, your teammates were unwilling to come forward to take ownership in their part of the sign. Since you are all in stated or non-stated agreement, that you should take full blame, you are hereby issued a 3-day suspension." From the language of this letter, it is clear that Zolotko believed that the sign was created by Collins and his fellow employees. Further, as demonstrated below in the *Weingarten* interviews, Zolotko took the position that Collins alone did not write the sign but that others, including a female were involved.

Moreover, I find Collins' activity in preparing and displaying the Tetra Pak sign was protected. Here, Collins sign was essentially a protest of working conditions at Respondent's facility as it urged Tetra Pak to resume its operation of the extrusion operation. While Collins said he wrote the sign as a joke because he did not think Tetra Pak officials would see the sign, he displayed the sign because he was dissatisfied with Respondent's management. *Timekeeping Systems, Inc.*, 323 NLRB 244 (1997); *M.V.M., Inc.*, 352 NLRB 1165, 1172 (2008). Thus I find Collins was engaged in protected-concerted activity that was known to Respondent.

Respondent's reliance on *Elko General*, supra, is not warranted here. In *Elko General* at 1427 the Board found the respondent had met its burden of showing it would have fired the employee for disloyalty and insubordination despite the employee's protected activity.

However here, the first time disloyalty is raised is in Respondent's brief. Apparently at the time of the suspension Respondent had not considered disloyalty a reason for suspending Collins as the suspension letter mentions only dishonesty and insubordination for not answering truthfully as grounds for the suspension. Moreover, there is nothing disparaging of Respondent's product or business mentioned in the sign. Thus, it

never lost the protection of the Act. *M.V.M., Inc.*, supra at 1172. I find Respondent's contrived argument that Collins engaged in an act of disloyalty is pretext.

In its defense, Respondent contends that Collins was not disciplined for writing the sign, but rather, that he was suspended for being dishonest during the investigative meeting as well as being insubordinate by not answering the questions honestly.

Initially, Respondent's *Wright Line* defense fails as it has presented no evidence that Collins lied about drafting the sign. The record reflects that Collins consistently told Respondent that he alone wrote the entire sign. Moreover, as discussed below, employee Becker denied she had any part in making any part of the sign. In the suspension letter Zolotko asserts that Collins was lying based on handwriting analysis of the sign. No evidence of any expert handwriting analysis was proffered for the record. Thus, the reasons asserted for Collins' suspension are baseless.

Moreover, as noted above, I find Respondent's reasons for suspending Collins are pretextual. This pretext supplies the unlawful motivation for Respondent's suspension of Collins. Respondent's pretext also eliminates the need for the mixed motivation analysis of *Wright Line*, as it has presented no valid defense. I find that Respondent violated Section 8(a)(1) of the Act in suspending Collins.

The *Weingarten* allegations

a. The facts

i. The February 13, 2014 fact finding meeting with employee Collins

Complaint paragraph 9 alleges that on about February 13, 2014, Respondent put restrictions on employee Collins' union representative's ability to speak and to remain present during an investigative interview.

As noted above, at the end of his shift on January 27, 2014, Collins and shop steward Rich Murray (Murray) went to General Manager Warthen's office for a fact finding meeting. Warthen, TDM Calhoun, Collins, and Shop Steward Murray attended the meeting. Warthen told Collins that this was a fact finding meeting regarding the Tetra Pak sign. Warthen asked Collins if he wrote the sign and Collins admitted that he had. Warthen then asked Collins if he knew that the sign could hurt Weyerhaeuser's reputation, and Collins answered that he had only intended for the sign to be a joke. Warthen then asked Collins if it was right for him to make a sign that soiled Weyerhaeuser's reputation with the customer and he said, "No." Warthen asked if Collins was happy with his employment with Weyerhaeuser and Collins responded that he was not satisfied with the way that Weyerhaeuser treated its employees. Warthen also asked Collins if he knew that there were 50 openings with Tetra Pak on Tetra Pak's website and Collins responded that he did not know that Tetra Pak had a website.

ii. Collins' February 13, 2014 fact finding meeting

On February 13, 2014, a second fact finding meeting was held with Collins. The meeting took place in the operator shack in the extruder department. Present were Collins, Shop Steward Jeff McGlone (McGlone), Respondent's human resource manager Zolotko, Amburgey, Warthen, and human re-

sources assistant Hurley. It is un rebutted and I credit both Collins and McGlone that the following discussion took place during this fact finding meeting. At the outset of the meeting Zolotko stated that this was a fact finding meeting involving the Tetra Pak sign and that the results could lead to discipline, up to and including termination. Union Steward McGlone asked Zolotko what section of the contract was violated and Zolotko said that it was section A(8) regarding dishonesty. Then Collins asked Zolotko if she was accusing him of being dishonest. When Zolotko did not answer Collins' question, McGlone asked Zolotko if she was accusing Collins of lying. Zolotko told McGlone to sit down and be quiet, that this was her meeting and she would be asking the questions. Then Zolotko showed the Tetra Pak sign to Collins. Zolotko then asked Collins about each word written on the sign. Each time Zolotko pointed at a word on the sign and asked Collins if he had written it, he admitted he had. Then Zolotko claimed she had a handwriting expert analyze the sign and the handwriting on the sign was done by two different people, one of whom was a woman.⁶ When McGlone asked her how she knew that some of the handwriting on the sign was done by a woman, Zolotko once again replied that this was her meeting and that she would be asking the questions. McGlone stopped asking questions during the meeting. Near the end of the meeting, Collins told Zolotko, "I wrote this. The whole thing. All three exclamation marks."⁷ Then, after looking more carefully at the sign, Collins told Zolotko that it looked like the third exclamation mark had been changed.

iii. The February 17, 2014 fact finding meeting with employee Joyce Becker

Complaint paragraph 10 alleges that on about February 17, 2014, Respondent put restrictions on employee Becker's union representative's ability to speak and to remain present during an investigative interview.

Respondent has employed Joyce Becker as a reel operator in the extruder department for 25 years. On February 17, 2014, during the investigation regarding the Tetra Pak sign, Becker was also called into a fact finding meeting. Shop Steward Luke Johnson (Johnson) represented Becker at this meeting. Zolotko ran the meeting with Warthen, Calhoun, and Hurley also present.

According to the testimony of Becker and Johnson, whose testimony was largely un rebutted and credible, the following occurred at this meeting. At the outset of the meeting Zolotko told Becker that this fact finding could lead to discipline up to termination for being dishonest. Zolotko asked Becker if she had been at the facility on January 27, 2014. Becker said she had not been at the facility that day but Warthen reminded Becker that she had been at a quality meeting at the facility that day. Becker admitted that she had forgotten that she had attended the quality meeting at the facility. Zolotko asked Becker when she had arrived and when she had left the facility. Then, Steward Johnson told Zolotko that Respondent already

had that information since that information is recorded at Respondent's front gate. Becker told Zolotko that she had come in the side gate at 6:45 in the morning and had left immediately after the meeting was over at about 10:30 to 10:45 a.m. Zolotko then asked Becker if she had heard about the Tetra Pak sign. Becker replied that she had heard about the sign, but that she had not seen it. Zolotko showed Becker the sign and asked her if she had written it. Becker said she had not written the sign. Zolotko asked Becker if she thought the third exclamation point on the sign looked like a phallic symbol. Steward Johnson said he understood that another employee had already admitted to writing the sign and he asked Zolotko for a copy of the minutes from the Collins' fact finding meeting. Zolotko told Johnson that he could ask for the information once the meeting was over, but she was not there to discuss Collins. Johnson replied that he had the right to ask for these minutes. Zolotko told Johnson that she was going to ask the questions, that Johnson was to be quiet and if he kept asking questions she would stop the meeting, ask him to leave and get a new shop steward. TDM Calhoun admitted that Zolotko told Johnson that he needed to be quiet during the meeting. Calhoun further admitted that Johnson told Zolotko that she was not letting him act as Becker's representative.

After a caucus between Johnson and Becker, Zolotko asked Becker if she had written any part of the sign. After Becker again told Zolotko that she had not written any part of the sign, Zolotko asked Becker if she would ever do anything that would hurt Respondent's relationship with its customers. When Becker did not understand the question, she asked Zolotko to repeat her question. After an exchange between Zolotko and Becker, that was not producing any results, Johnson attempted to explain Zolotko's question to Becker. Then Zolotko once again told Johnson that she would be asking the questions. Zolotko then turned to Johnson and said, "Thanks a lot Luke,"⁸ and then asked him to step into the hall with her. In the hall Zolotko reminded Johnson of the seriousness of the meeting and accused Johnson of telling Becker to be combative. Johnson denied this accusation. When Zolotko and Johnson came back into the room, Zolotko asked Becker again if she would ever do something to make Respondent look bad. Becker responded that she would not and that she always put out a quality product. Zolotko asked her again if she had written any part of the sign and Becker denied she had. Zolotko then said one person had written, "Please Buy Us Back!!!" and another had written "Tetra Pak." Becker said that she did not write the sign and she told Warthen that if she had written the sign, she would have admitted it.

Johnson said again that someone already admitted to writing the sign. Zolotko told Johnson that that she would be asking the questions, this was her investigation, and that Johnson needed to be quiet.

While Respondent alleged Johnson was loud and disruptive during the meeting, according to Becker and Johnson, Johnson did not raise his voice or interrupt Zolotko during the meeting. This is consistent with the testimony of Respondent's TDM Calhoun who admitted that during the meeting Johnson never

⁶ As it turns out the handwriting expert was Zolotko herself. I find no basis in the record for establishing Zolotko to be a handwriting expert.

⁷ Tr. p. 264, lines 7-10.

⁸ Tr. p. 331. Line 1.

screamed and to the extent that Johnson did raise his voice, he was doing so in order to get his point across to represent Becker. Calhoun also admitted that the only time when Johnson could be said to be interrupting Zolotko was when Johnson asked why Becker was being questioned when another employee had already admitted to writing the sign. In this regard, to the extent Hurley and Zolotko's testimony is inconsistent with that of Becker Johnson and Calhoun, I will credit Becker, Johnson and Calhoun. After the meeting, Johnson followed up with Zolotko and requested that Zolotko provide him with the notes from Becker and Collins' fact findings, but she did not provide them to Johnson.

b. The analysis

General Counsel argues that under *NLRB v. J. Weingarten*, 420 U.S. 251, 262–263 (1975), the role of the union representative is to provide assistance and counsel to an employee who is being interrogated. An employer may not, therefore, silence a union representative.

Respondent contends that in the Collins and Becker fact finding meetings, Zolotko did not try to silence the union representatives but was merely asserting her right to conduct an investigation without interference from union officials, citing *Manville Forest Products*, 269 NLRB 390 (1984); *Cook Paint & Varnish, Co.*, 246 NLRB 646 (1979); and *New Jersey Bell Telephone Co.*, 308 NLRB 277 (1992).

Under *NLRB v. J. Weingarten*, 420 U.S. 251 (1975), the Board has held an employee has a right to union representation in an investigative interview when the employee reasonably believes the interview may result in discipline.

The right to a representative includes the right to an effective representative who is present to give assistance and counsel. An employer may not, therefore, silence a union representative. *Southwestern Bell Telephone Co.*, 251 NLRB 612, 613 (1980). Accordingly, an employer may not tell a union representative to remain silent during an interview. *USPS*, 355 NLRB 368, 397 (2010).

Contrary to Respondent's assertion, Zolotko went well beyond merely informing the union representatives that she was asserting her right to conduct the interviews. During the February 13, 2014 interview with Collins, Zolotko told union representative McGlone to sit down and be quiet. During the February 17, 2014 interview with Becker, Zolotko told Union Representative Johnson that she was going to ask the questions, that Johnson was to be quiet and if he kept asking questions she would stop the meeting, ask him to leave and get a new shop steward. Later during this interview Zolotko again told Johnson that that she would be asking the questions, this was her investigation, and that Johnson needed to be quiet.

Moreover, contrary to Respondent's assertion, there is no evidence that either McGlone or Johnson were disruptive during the interviews. *New Jersey Bell Telephone Co.*, 308 NLRB 277 (1992), cited by Respondent is inapposite. In *New Jersey Bell*, the union representative objected to all repetitive questions asked by the employer. The Board found this disruptive of the investigatory process. Here there is no evidence that McGlone or Johnson engaged in any such disruptive conduct. While they both asked questions and tried to provide assistance and coun-

sel, there was no disruption of the interview, verbal abuse, insulting interruptions, or demeaning conduct. *Yellow Freight Systems*, 317 NLRB 115, 124 (1995).

By her orders to McGlone and Johnson to be silent, Zolotko effectively prevented them from giving effective assistance and counsel to Collins and Becker, thereby denying Collins and Becker their right to have a union representative present in violation of Section 8(a)(1) of the Act.

Complaint paragraph 11 alleges that on about June 5, 2014 Respondent removed a union communication form a union bulletin board.

a. The facts

In June 2014, former Local 580 Officer Rex Osborne (Osborne), placed a cartoon⁹ on a Local 580 union bulletin board in Respondents' E & I maintenance shop in the E & U department. The cartoon had a definition of bad faith bargaining and showed parties sitting down at the bargaining table with Respondent representatives shown wearing ear plugs while telling the union representatives: "We're listening." After Osborne posted the cartoon, TDM John Strouburg (Strouburg) told Osborne that he was going to have to take the cartoon down. Osborne asked Strouburg who told him to take the cartoon down and Strouburg replied that no one had. Osborne told Strouburg he could not take it down because it was a union posting. Then Strouburg admitted that he had been told to take all derogatory cartoons down.

The parties' collective-bargaining agreements provide that Respondent will "supply adequate enclosed locked bulletin boards for the use of the Local Union in posting of official bulletin boards."¹⁰ There are union designated bulletin boards throughout Respondent's facility that contain Union and other nonunion related postings. For example, for the past 3 years, pamphlets on charter fishing trips have been posted on the union designated bulletin boards and these have not been removed by management.

b. The analysis

General Counsel contends that an employer may not remove notices from a union bulletin board.

Respondent contends there is no violation since the cartoon remained posted for 2 months and Osborn was not an officer of the Union at the time of the posting and there was no evidence that he was authorized to post a union communication.

In *Marriott Management Services, Inc.*, 318 NLRB 144, 153 (1995), the Board affirmed the administrative law judge who found:

It is well established that there is no statutory right of employees or a union to use an employer's bulletin board. However, it is also well established that when an employer permits, by formal rule or otherwise, employees and a union to post personal and official union notices on its bulletin boards, the employees' and union's right to use the bulletin board receives the protection of the Act to the extent that the employer may not remove notices or discriminate against an employee who

⁹ GC Exh. 54.

¹⁰ GC Exhs. 3 and 4 at p.22.

posts notices, which meet the employer's rule or standard but which the employer finds distasteful. Citing, *Container Corp. of America*, 244 NLRB 318 (1979).

Here, it is uncontested that Supervisor Strouburg removed Osborne's cartoon from one of union designated bulletin boards, even though other personal items had also been posted on those bulletin boards without being removed. As noted in *Marriott*, supra, it is immaterial whether it was the union or an employee who posted the notice. Once the employer has given permission to use a bulletin board it may not remove union related items it finds distasteful. As the cartoon constituted a statement about the conditions of collective bargaining with Respondent, it was protected under section 7 and Respondent violated Section 8(a)(1) when it discriminatorily removed this pro union commentary from the bulletin board.

c. The 8(a)(5) allegations

1. The October 2013 change in training evaluations

Complaint paragraph 12(a) alleges that in October 2013 Respondent changed its practice with regard to how it performs training evaluations in its E & U department without the agreement of the Union.

a. The facts

The record reflects that the parties have bargained for and memorialized contract language that method and means of evaluation of employee skills shall be jointly agreed upon. The March 15, 2007, through March 14, 2014, collective-bargaining agreement in the Local 580 unit provides in pertinent part under 580 Local Ground Rule No. 48 the subheading 8. Pay for skills¹¹:

....

Some component of pay will be based on skill, with increasing pay as additional skills and capabilities are acquired and used.

Processes will be developed to assure that acquired skills are maintained and continuously improved upon. For greater clarity, management shall have the right to implement certification requirements where required by law or when recommended by industry standards (e.g. Black Liquor Recovery Boiler Advisory Committee, Factory Manual). **The Company and the Union will jointly develop the means of evaluation.**

Each pay level will include elements of leadership, administration, operation, coordination, project management and maintenance.

The new work design will define the advancement process. **The minimum qualification levels and performance standards will be determined by mutual agreement between the Company and the Union.**

Employees hired into the mill after March 15, 2008 must demonstrate the capability and aptitude to eventually perform all jobs within the work system before being allowed to work

in any such system. **The Company and the Union shall jointly develop the instrument(s) to be used to measure capability and aptitude through the application of a structured external evaluation tool, such as Work Keys or another mutually agreed to tool.** (emphasis added)

This provision of the Local 580 collective-bargaining agreement has been retained in the parties' successor agreement.

Dan Sauer (Sauer), who has conducted all of Respondent's classroom training for employees in the E & U department since 2010, testified without contradiction, and I credit his testimony, that the parties' 1999 E & U final design agreement,¹² referred to in the Local 580 collective-bargaining agreement as the "new work design,"¹³ reflects that Local 580 and Respondent have joint decision making authority with regard to the "level of skills needed," the "gap between current and needed skills," and scheduling training for E & U employees.

Under the E & U final design agreement the areas listed as "Assess mastery; verify learnings" are to be decided by the system leader and system leader has the sole authority to "Approve/Veto" such determinations.¹⁴

Sauer testified without contradiction that Respondent's E & U department is broken down into two discreet sections, the power house and effluent department. Power house employees are either in recovery or power jobs. The E & U department is part of the Local 580 bargaining unit. Local 580 and Respondent have agreed on the skills that employees at each level must have mastered in order to move up to the next qualification level. These skills are contained in the parties March 15, 2007, through March 14, 2014, collective-bargaining agreement as modified in the current agreement, reflected in Respondent's best and final offer.¹⁵ The job positions and pay rates in the recovery and power side range from D (lowest) to A (highest).¹⁶ Each time an employee goes from one level to the next, they receive a raise of \$1 to \$4.

Sauer said that before October 2013, in order for an employee to move from the entry position to the next higher level in the E & U department, the employee had to go through both formal classroom and on-the-job-training of 2 to 12 weeks from an experienced employee (OJT). The employee is given an OJT check list¹⁷ that sets forth all the job functions that the trainee is responsible for learning. The employee checks off each item in the list as it is completed.

According to Sauer, before October 2013 after several weeks of classroom training and OJT, the employee would meet with their supervisor, to discuss the employees' qualifications to perform the job for which they were training. Sauer stated that before October 2013, the typical meetings between supervisor and employee lasted about 15 to 30 minutes where the supervisor asked the employee questions or posed hypothetical problems for the employee to solve. If the supervisor found the employee qualified, the employee was promoted into the next

¹¹ GC Exh. 4, pp. 176-177.

¹² GC Exh. 37, p. 26.

¹³ GC Exh. 4, p. 177.

¹⁴ GC Exh. 37, pp. 24-26.

¹⁵ GC Exhs. 5, and 37 pp. 12-14.

¹⁶ GC Exh. 37, p. 2.

¹⁷ GC Exhs. 27-34.

higher job position and got a raise. There is no dispute that Respondent's evaluation system had operated in this way for at least the past 20 years.

Sauer stated that in about August of 2013, Respondent hired Alsemaan as its E & U manager. According to Sauer's uncontradicted testimony, in the fall of 2013, Alsemaan changed the way E & U employees were evaluated and promoted. The meetings to evaluate employees' skills went from 15–30 minute sessions to four 14 hour sessions.¹⁸ The meetings now included not only the employee and immediate supervisor but also Alsemaan and Sauer. Rather than the immediate supervisor, the meetings were now run by Alsemaan. These new evaluation meetings were broken into 2 hour increments and could last for up to seven sessions. According to Sauer, because these meetings involved multiple meetings they became difficult to schedule and resulted in the evaluation process taking months longer to complete than it had before the Fall of 2013. Sauer said that Alsemaan began testing employees on subject matter that had not been previously covered, including safety and environmental issues.

On April 2, 2014, Local 580 President Michael Silvery (Silvery) wrote a letter to human resources manager Zolotko requesting that Respondent meet and bargain about the changes in the E & U department employees' evaluation process and requesting documentation regarding the changes.¹⁹ On April 8, 2014, Zolotko responded by email stating only that the bargaining issue should be addressed by the parties' grievance procedure.²⁰

b. The analysis

It is General Counsel's position that Respondent violated Section 8(a)(5) of the Act when it failed to notify or bargain with Local 580 of its intention to change the method by which it was going to be conducting the training evaluations or the effect that these changes would have on its bargaining unit.

Respondent contends that the Union clearly and unmistakably waived its right to bargain over any changes to the training evaluations of bargaining unit employees in the E & U department.

The Board and Courts have long held that Section 8(a)(5) of the Act requires an employer to provide its employees' representative with notice and an opportunity to bargain prior to making material, substantial, and significant changes with respect to terms and conditions of employment that are mandatory subjects of bargaining. *NLRB v. Katz*, 369 U.S. 736 (1962); *Toledo Blade Co.*, 343 NLRB 385, 387 (2004). Evaluations that have the potential to affect the wage rate an employee might receive, are a mandatory subject of bargaining. *Saginaw Control & Engineering*, 339 NLRB 541 (2003).

Wages, hours, and other terms and conditions of employment generally survive the expiration of a collective-bargaining agreement. *Hen House Market No. 3*, 175 NLRB 596 (1969). In addition, "an employer's regular and longstanding practices that are neither random nor intermittent become terms and con-

ditions of employment even if these practices are not required by the collective bargaining agreement." *Prime Healthcare Services*, 357 NLRB 653, 660 (2011). The Board has held that an employer cannot change established past practices without notifying and offering to bargain with the union. *Id.*

The changes here to a mandatory subject of bargaining and long-established practice are significant as these evaluations are directly related to significant wage increases. Significantly, the parties' collective-bargaining agreement itself specifically states that Respondent and Local 580 will *jointly* develop the means of evaluation and that the minimum qualification levels and performance standards will be determined by *mutual* agreement between Respondent and Local 580.

It is uncontested that Respondent significantly changed the way that the E & U department performed its training evaluations beginning in October 2013. There is no dispute that before October 2013 and for the past 20 years, the training evaluations consisted of the operator's TDM asking a few general questions about the performance of the new position and that such questioning would last anywhere from 15 to 30 minutes. When the TDM had any concerns about the trainees' qualifications after their interview, the trainee would be sent back for 1 or 2 weeks of OJT to work on their skills and then the trainee would be moved up to the next classification.

The change in manner of evaluating trainees resulted in delays in moving up to the next classification, because the coordination in the schedules of several different managers for a series of meetings took more time than setting up a single 15-minute evaluation. In addition, the content of the information that was tested changed from a focus on job duties to include Respondent's safety and environmental policies.

Respondent does not deny that it neither notified nor bargained with Local 580 prior to its implementation of this change. In its defense Respondent argues that the Union waived its right to bargain over any changes to the evaluation procedures in the E & U department through the terms of the collective-bargaining agreement.

A waiver of the duty to bargain may result from action or inaction, through contractual language specifically waiving the right of a party to bargain about a particular subject or in the failure of a party to protest unilateral action. *Ador Corp.*, 150 NLRB 1658 (1965); *U.S. Lingerie*, 170 NLRB 750 (1968). However, the Board and the courts have construed the waiver doctrine narrowly and have been reluctant to infer waiver in the absence of clear and unmistakable conduct. *Metropolitan Edison Co., v. NLRB*, 460 U.S. 693, 708 (1983). The clear and unmistakable test applies where the waiver is claimed in contract language. In this regard in *Amoco Chemical Co.*, 328 NLRB 1220, 1121–1122 (1999) the Board held:

Either the contract language relied on must be specific or the employer must show that the issue was fully discussed and consciously explored and that the union consciously yielded or clearly and unmistakably waived its interest in the matter.

Respondent refers to its collective-bargaining agreement with Local 580 to establish that there was a waiver by the Union of its right to bargain over the E & U department evaluation process. In support of its waiver argument, Respondent cites

¹⁸ GC Exhs. 35 and 36.

¹⁹ GC Exh. 6.

²⁰ GC Exh. 8.

local ground rule (LGR) No.48 which provides in part:

580 LOCAL GROUND RULE NO. 48

Subject: Work Design Principles, Processes and Roles

1. All Work systems will have these main elements included in their designs:

- work teams
- job function rotation
- pay for skills and knowledge
- verification of skills and knowledge
- training processes
- operator-maintenance interface
- team administrative roles
- communication with and between teams²¹

Respondent also cites that the E & U Work design agreement²² includes provisions for pay for skills and knowledge and verification of skills and knowledge; that it establishes required skill blocks that must be verified before moving on to the next skill block; and that it assigns the authority and responsibility to assess mastery and verify learnings to the system leader who is Department Manager Alsemaan.

Notwithstanding Respondent's citations to the negotiated agreements between it and Local 580, the language of those is agreements is clear that the parties agreed in their collective-bargaining agreement²³ that there would be joint decision making with respect to such items as:

The Company and the Union will jointly develop the means of evaluation.

The minimum qualification levels and performance standards will be determined by mutual agreement between the Company and the Union.

The Company and the Union shall jointly develop the instrument(s) to be used to measure capability and aptitude through the application of a structured external evaluation tool, such as Work Keys or another mutually agreed to tool.

It is also clear from the work design agreement implemented pursuant to the terms of the above cited collective-bargaining agreement that the parties contemplated joint decision making authority with regard to the "level of skills needed," "select plan needed," the "gap between current and needed skills," and "schedule training" for E & U employees.

Although the work design agreement provides that the authority and responsibility to "assess mastery" and "verify learnings" resides with the system leader, this language cannot be viewed as a clear and unmistakable waiver by the Union of its right to bargain over changes to extant procedures of evaluation. This language only reflects who the parties have agreed will be the person to determine if trainees have acquired the skills necessary to advance. It is the language of the collective-bargaining agreement that is clear that the parties shall together develop, "The minimum qualification levels and performance standards . . ." and "shall jointly develop the instrument(s) to be

used to measure capability and aptitude through the application of a structured external evaluation tool, such as Work Keys or another mutually agreed to tool." Id.

I find no evidence from the terms of the collective-bargaining agreements between the parties that Local 580 clearly and unmistakably waived its right to bargain over the means of evaluating the E & U department employees.

Respondent argues further that the Union essentially waived its right to bargain over the changes to the evaluation process because it took no action concerning the changes from October 2013 until April of 2014 and that while the parties were in negotiations from February 2014 to July 2014, the Union never made any proposals regarding the changed evaluation process.

The evidence reflects that Respondent implemented the changes to the E & U department evaluation process in about October 2013 without notice to or bargaining with the Union. The Board has long held that a union cannot be held to have waived bargaining over a change that is presented as a fait accompli. In this regard, in *Intersystems Design & Technology Corp.*, 278 NLRB 759 (1986), the Board cited *Gulf States Mfg. v. NLRB*, 704 F.2d 1390, 1397 (5th Cir 1983):

In *Gulf States*, the court dealt not only with the adequacy of the notice, but also with the related waiver issue (704 F.2d 1397): It is . . . well established that a union cannot be held to have waived bargaining over a change that is presented as a fait accompli. . . "An employer must at least inform the union of its proposed actions under circumstances which afford a reasonable opportunity for counter arguments or proposals." Notice of a fait accompli is simply not the sort of timely notice upon which the waiver defense is predicated. [Citations omitted.]

Respondent also argues that the language of the collective-bargaining agreement precludes a finding that the evaluation process prior to October 2013 was an existing term and condition of employment.

Respondent cites section 32 C of the collective-bargaining agreement²⁴ which provides:

The failure of the Union to enforce any of the provisions of this Agreement or exercise any rights granted by law, or the failure of the Company to exercise any right reserved to it, or its exercise of any such right in a particular way, shall not be deemed a waiver of any such right or waiver of its authority to exercise any such right in some other way not in conflict with terms of this Agreement.

This section of the collective-bargaining agreement is similar in nature to a management rights clause which the Board has uniformly held will not constitute a waiver by the union of its right to bargain over a mandatory subject of bargaining in the absence of evidence that the particular subject involved was knowingly discussed and waived by the union. *Dubuque Packing Co.*, 303 NLRB 386 (1991).

Respondent appears to argue that this language permits it to enforce rights it has under the collective-bargaining agreement despite a contrary practice. The problem with this argument is

²¹ GC Exh. 4, p. 173.

²² GC Exh. 37.

²³ GC Exh. 4, pp.176-177.

²⁴ GC Exh. 4, p. 52.

that, as noted above, the collective-bargaining agreement has never given Respondent the sole right to determine the “instrument(s) to be used to measure capability and aptitude. . .”

There is no evidence that the Union has waived its right to bargain over the evaluation process of unit employees in the E & U department.

I find that Respondent violated Section 8(a)(5) of the Act when it unilaterally changed the length, content, and format of E & U department bargaining unit employees’ evaluations without first notifying and bargaining with the Union about these changes. *NLRB v. Katz*, 369 U.S. 736 (1962); *Saginaw Control & Engineering*, 339 NLRB 541 (2003).

2. The January 2014 changes in rules regarding food safety

Complaint paragraph 12(b) alleges that in January 2014 Respondent implemented new rules related to food safety without the agreement of the Union.

a. The facts

Respondent adopted its predecessor Tetra Pak’s food safety hygiene rules in early 2010 after reacquiring the extruder facility. In February, 2014, Respondent implemented hygiene standards known as Food Safety System Certification (FSSC) 22000. The FSSC 22000 consisted of two parts: International Standards Organization (ISO) 22000 and Publicly Available Standard (PAS) 223. ISO 22000 is a food product quality management system. ISO 22000’s predecessor was ISO 9001, a generic process quality management system. Respondent had operated under ISO 9001 since 1987. Tetra Pak had also operated under ISO 9001 and when Respondent reacquired the extruder department it adopted and incorporated Tetra Pak’s ISO 9001 documentation.

In February 2014, Respondent implemented a new set of hygiene standards at its facility as set forth in “FSSC 22000 Food Safety Training—new hygiene standards” training material²⁵ introduced to employees through a series of food safety training sessions which took place in late January 2014. These new rules were implemented immediately following the training sessions in February 2014.²⁶ These rules applied to the Local 633 paperboard and extruder units.

The Unions first became aware that there could be changes in Respondent’s food safety rules was in early February 2014 from their members.

In June 2014 a summary of the rules²⁷ for the rewinder hygiene zone and the L3 paper machine hygiene in the paperboard unit was posted on the facility bulletin boards.

According to the un rebutted and credited testimony of Respondent’s advanced lab technician in the paperboard department and Local 633 recording secretary, Lowell Lovgren (Lovgren), prior to February 2014 paperboard and extruder bargaining unit employees were permitted to drink coffee and beverages and chew tobacco on the production floor including the paper machine, the winder, the wrap line, the back tender control room, the winder control room and the wrap line control station and employees could eat lunch in the winder break shack and

the back tender shack. After February 2014 only clear beverages were permitted on the production floor and the rewinder area was cordoned off as a hygiene area and no food or beverages were allowed in the shacks. Chewing tobacco was also prohibited throughout the production area.

Lovgren also testified without contradiction that a new hygiene zone was created in April 2014 around the rewinder area in the paperboard unit and demarcated by a blue line painted on the floor. In this hygiene zone employees could have no personal belongings, food, or beverages other than water.

While Respondent’s January 2014 training materials²⁸ reflect there were extant hygiene rules in the Local 633 extruder bargaining unit, including no use of tobacco products, no gum or candy, no food or drink, according to Lovgren’s un rebutted and credited testimony, prior to February employees could drink coffee and eat food in the extruder hygiene zone so long as it was in the shack which is part of the hygiene zone. After April 2014 employees could no longer drink coffee or eat food in the hygiene zone. Respondent’s customer in technical service manager Scott Donaldson (Donaldson) admitted that new restrictions were added to the extruder department in February 2014, including the prohibition of personal items such as purses, lunchboxes, backpacks, coats, toothpicks in mouths, nail polish, false nails, false eyelashes, and loose clothing above the waist.²⁹

Donaldson admitted that Respondent began strictly enforcing the water only restrictions for the five shacks located in the extruder department starting in February 2014. It is un rebutted that Respondent has also now restricted any food or beverage on the floor even during a shutdown, contrary to its past practice.

Zolotko advised the Union that employees could be disciplined for noncompliance with the new rules.³⁰

b. The new cleaning requirements of the hygiene standards

As part of Respondent’s new hygiene standards it required bargaining unit employees to ensure that specific areas of the facility were cleaned by filling out “Cleaning Inspection Checklists.”³¹ To verify the cleaning had taken place. In January 2014, Respondent gave bargaining unit members these check lists³² and told them to fill them out and hand to their supervisors daily. New checklists were created for the following areas: rewinder, winder, wet end, stock prep, roll line, dry end, starch deck, dry end backtender, roll line operations, starch deck operators, stock prep, machine tender—wet end, rewind storage area, loading dock/warehouse, loading dock 5, 3 rail line, 2 rail line, fine paper cleaning, west end shredder, extruder winder, #6 extruder, #6 extruder unwind, and #7 extruder unwind. Donaldson admitted that these checklists and employee responsibilities associated with the checklists were implemented for the first time in February 2014 and that, prior to February 2014, employees were not responsible for this kind of inspection or cleaning. Donaldson further admitted that Respondent’s

²⁵ GC Exh. 23.

²⁶ GC Exh. 25, p. 2.

²⁷ GC Exh. 26.

²⁸ GC Exh. 23, p. 8.

²⁹ Ibid. at p. 9.

³⁰ GC Exh. 25, p. 2.

³¹ GC Exh. 24, points 8–10 and Exh.25, points 8–10.

³² GC Exhs. 56–103.

rule that employees inspect to ensure that there was no glass or brittle plastic in any of the hygiene zones was also part of the new food safety expectations and had not been previously required. He further admitted that the housekeeping standards in the Extruder department were increased and now required new inspections and checklists.

It is undisputed that in February 2014, Respondent implemented new job duties in requiring employees to fill out checklists ensuring that certain areas of the facility were clean. In addition, if those areas were not clean, the employee would be responsible for cleaning those areas. It is also un rebutted that, as of February 2014, Respondent required employees, such as employees who work in the rewinder area, to spend the last hour of their 4-day shift thoroughly cleaning each of the areas listed on the checklist, a job duty that was not previously required.

Respondent's paperboard unit employee Gabe Lovingfoss (Lovingfoss) testified about the new cleaning requirements and new forms³³ certifying the Langston Rewinder is clean. The back side of the form sets forth a list of 13 different glass and plastic fixtures (such as windows, gauges, and mirrors) that the employee is responsible for checking to make sure they are intact and not broken. The new checklist on its front side sets forth the following requirements:

Employee Responsible for Cleaning: Langston Operator

Frequency: Every shift and after maintenance down
 Clean Winder frame until free of loose dust and debris. Use compressed air.
 Clean floor under Winder until free of dust and debris. Use compressed air.
 Clean Control room until free of dust and debris. Use compressed air, Wipe down with a Wypall towel use cleaners
 Clean Unwind Stand until free of dust and debris. Use compressed air, wipe down with Wypall towel and use cleaners.
 Clean all Paper rolls and Winder drums until free of dust, debris and tape. Wipe down with a Wypall towel and use cleaners.
 Clean all dust and floor debris around Langston area. With Factory Cat Sweeper, broom and dust pan
 Bug light OF-25A is working, southwest of Langston
 No food or food waste in the Control room or Hygiene Zone
 Operator to use clean gloves when processing product
 No food waste in process waste
 Complete the Glass & Brittle Plastics checklist on the back-side
 If down for maintenance, wipe down Langston frame with simple green.

Lovingfoss credibly testified without contradiction that Managers Greg Jasmer and Mike Haas provided Lovingfoss and his coworkers with the above checklist after the January 2014 training sessions and explained that now the operators were responsible for cleaning the machines, checking off each item on the checklists and providing the completed list to their TDM each day after they had done so. In addition to filling out these checklists on a daily basis, Respondent directed employ-

ees to spend the last hour of each 4-day shift performing a thorough cleaning in each of the areas on the checklists. These requirements were new.

Respondent asserts Lovingfoss testified that the only new task required as a result of the FSSC 22000 rules is that the day shift operator of the Langston Rewinder is required to thoroughly clean the machine at the end of their four day week. Contrary to Respondent's assertion, Lovingfoss testified that in addition to cleaning the machine he now, for the first time after January 2014, had to fill out the above forms certifying he had cleaned the machine.³⁴

c. The analysis

General Counsel argues that Respondent failed to notify or bargain with Local 580 regarding their intention to implement changes to their food safety regulations or the effect that these changes would have on its bargaining unit employees.

On the other hand, Respondent contends that the Union has waived its right to bargain over changes in the food safety regulations by contract language or by inaction.

As noted above, Section 8(a)(5) of the Act requires an employer to provide its employees' representative with notice and an opportunity to bargain prior to making material, substantial, and significant changes with respect to terms and conditions of employment that are mandatory subjects of bargaining. *NLRB v. Katz*, 369 U.S. 736 (1962); *Toledo Blade Co.*, 343 NLRB 385, 387 (2004). The Board has found tobacco bans and food restrictions to be material and constitute a unilateral change in terms and conditions of employment, especially where those new work rules could be grounds for discipline. *W-I Forest Products Co.*, 304 NLRB 957, 959 (1991); *King Soopers, Inc.*, 340 NLRB 628 (2003); *Toledo Blade Co., Inc.*, 343 NLRB 385 (2004). Also employee job assignments are a mandatory subject of bargaining. *Flambeau Airmold Corp.*, 334 NLRB 165, 171-172 (2001). The Board has found that an increase in job duties is a mandatory subject of bargaining. *Bundy Corp.*, 292 NLRB 617, 678 (1989).

An employer may however, unilaterally implement changes to working conditions where the Union has waived its right to bargain over specific terms and conditions of employment. A waiver of the duty to bargain may result from action or inaction, through contractual language specifically waiving the right of a party to bargain about a particular subject. When a "management-rights" clause is the source of an asserted waiver, it is normally scrutinized by the Board to ascertain whether it affords specific justification for unilateral action. *Mt. Sinai Hospital*, 331 NLRB 895, 895 fn. 2 (2000); *Johnson-Bateman Co.*, 295 NLRB 180, 184 (1989). It is well settled that the waiver of a statutory right will not be inferred from general contractual provisions; rather, such waivers must be clear and unmistakable. *New York Mirror*, 151 NLRB 834, 839-840 (1965).

Similarly, the failure to protest unilateral action may result in a waiver. *Ador Corp.*, 150 NLRB 1658 (1965); *U.S. Lingerie*, 170 NLRB 750 (1968). However, the Board and the Courts have construed the waiver doctrine narrowly and have been

³³ GC Exh. 56.

³⁴ Tr. at p. 607, lines 12-14.

reluctant to infer waiver in the absence of clear and unmistakable conduct. *Metropolitan Edison Co., v. NLRB*, 460 U.S. 693, 708 (1983). Only where the collective-bargaining agreement provides a clear and unmistakable waiver of the union's right to bargain may an employer unilaterally implement rules. *Provena St. Joseph Medical Center*, 350 NLRB 808 (2007).

There is no dispute that Respondent failed to notify or bargain with Local 580 in February 2014 regarding their intention to implement changes to their food safety regulations or the effect that these changes would have on its bargaining unit employees. Respondent unilaterally implemented new job duties in requiring employees to fill out checklists ensuring that certain areas of its facility were clean. In addition, if those areas were not clean, the employee would be responsible for cleaning those areas. It is also un rebutted that, as of February 2014, Respondent required employees, such as employees who work in the rewinder area, to spend the last hour of their 4-day shift thoroughly cleaning each of the areas listed on the checklist, a job duty that was not previously required.

In addition, it is uncontested that Respondent's new restrictions on its employees' ability to use chewing tobacco or have food, drink, and other personal items on in the production area as well as the newly designated hygiene zones were implemented without first notifying or bargaining with the Union. Respondent's implementation of these new food safety rules materially affected its employees' terms and conditions of employment and constituted a mandatory subject of bargaining.

In support of its argument that Local 580 and Local 633 waived their right to bargain over new hygiene rules, Respondent cites Section 17 of the collective-bargaining agreement between Respondent and Local 580³⁵ that applies to the extruder department and the identical provisions in section 17 of its agreement with Local 633³⁶ dealing with the L3 department and the Langston Rewinder which provide that:

A. Causes for discipline or discharge are as follows:

13. Refusal to comply with Company Rules

a. Provided that such rules shall be posted in each department where they may be read by all employees and further, that no changes in present rules or no additional rules shall be made that are inconsistent with this Agreement: and further provided, that any existing or new rules or changes in rules may be the subject of discussions between the Local Union Standing Committee and the Local Mill Manager, and in case of disagreement, the procedure for other grievances shall apply.

Respondent also cites section 17 B. 337 of the collective-bargaining agreements³⁸ which provide:

Where a letter of reprimand, suspension or discharge is deemed justified, the final decision will be deferred until the appropriate Local Union representative has a reasonable op-

portunity to investigate the facts and then discuss the matter with the appropriate supervisor in the presence of the employee. . . .

Citing *Provena St. Joseph Hospital*, 350 NLRB 808, 810, 815 (2007), Respondent argues that taken together, the above contract provisions constitute a clear and unmistakable waiver of the Union's right to bargain about Respondent's work rules.

In *Provena* the employer argued that the union had relinquished its right to bargain over two subjects, incentive pay and a new attendance tardiness policy. The contract language in issue was a managements-rights provision that provided, inter alia:

(1) . . . [e]xcept as specifically limited by express provisions of this Agreement, [the Respondent] retains exclusively to itself the traditional rights (as historically existed prior to Association organization) to operate and manage its business and to direct its employees; (2) the clause permitting the Respondent "to change or eliminate existing methods, materials, equipment, facilities and reporting practices and procedures and/or to introduce new or improved ones; (3) the clause authorizing the Respondent "to suspend, discipline and discharge employees"; (4) the clause allowing the Respondent to "make and enforce the rules of conduct, standards, and regulations governing the conduct of employees"; (5) Respondent's right "to establish and administer policies and procedures related to research, education, training, operations, services and maintenance" of the Respondent's operations; and (6) the final section, reserving to the Respondent the right "to determine or change the methods and means by which its operations are to be carried on; to take any and all actions it determines appropriate, including the subcontracting of work, to maintain efficiency and appropriate patient care." Id. at 810.

The Board found that the employer did not violate the Act with respect to the newly implemented incentive pay program but that it did not violate the Act with regard to the new disciplinary policy on attendance and tardiness. The Board held that the:

Application of our traditional standard reveals that several provisions of the management-rights clause, taken together, explicitly authorized the Respondent's unilateral action. Specifically, the clause provides that the Respondent has the right to "change reporting practices and procedures and/or to introduce new or improved ones," "to make and enforce rules of conduct," and "to suspend, discipline, and discharge employees." By agreeing to that combination of provisions, the Union relinquished its right to demand bargaining over the implementation of a policy prescribing attendance requirements and the consequences for failing to adhere to those requirements. Such a conclusion requires no resort to a "contract-coverage" analysis, for the contract itself plainly speaks to the right of the Respondent to act.

Contrary to the contract language in *Provena* and in both *Cincinnati Paperboard*, 339 NLRB 1079 (2003), and *Ingham Regional Medical Center*, 342 NLRB 1259 fn. 1 (2004), the language here does not clearly and unmistakably give Respondent the right to formulate new work rules. Here the lan-

³⁵ GC Exh. 4, p. 21, sec. 17, erroneously cited in R. Brf. as GC Exh. 2, sec.16.

³⁶ GC Exh. 3, p. 21

³⁷ Erroneously cited as sec.16.

³⁸ GC Exhs. 3 and 4 at p. 21.

guage of section 17 in both contracts deals with discipline for not following extant rules not with Respondent's right to unilaterally implement new work rules. Indeed, the language of section 17 A. 13 specifically states that there shall be discussions between the Respondent and Locals 580 and 633 regarding any changes to extant rules. Section 17 B. 3 has nothing to do with the Unions' waiver of bargaining over work rules.

As to Respondent's argument that the Unions waived their right to bargain over the hygiene rules by inaction, no waiver can occur where the union is presented with a fait accompli. The evidence reflects that Respondent implemented the changes to its food safety regulations in about February 2014 without notice to or bargaining with the Union. The Board has long held that a union cannot be held to have waived bargaining over a change that is presented as a fait accompli. *Intersystems Design & Technology Corp.*, 278 NLRB 759 (1986). Here, since the changes were made without notice to or bargaining with the Unions they were presented by Respondent with a fait accompli for which there can be no waiver.

Having found that Respondent unilaterally implemented new hygiene rules without notice to or bargaining with the Unions and that the Unions did not waive their rights to bargain over the implementation of these rules, I find that Respondent thereby violated Section 8(a)(5) of the Act.

3. The March 2014 changes to scheduling of training operators in the energy and utility department

Complaint paragraph 12(c) alleges that in March 2014 Respondent changed its practice of how it schedules its training operators in its E & U department. In its brief Respondent asserted that it no longer contests paragraph 12(c) regarding training scheduling.

a. The facts

There is no dispute that in a May 4, 2014, email Alsemaan told employees and management in the E & U department that "all new hires and transferred employees will work 8 hour days 5 days a week Monday through Friday 7AM-3PM."³⁹ Prior to this email, new E & U department trainees worked four 12-hour shifts each week. Therefore, after May 4, 2014 E & U trainees' hours were reduced from 48 hours to 40 hours per week.

b. The analysis

It is uncontested that Respondent never notified or bargained with Local 580 before implementing this scheduling change. The Board has found the scheduling of employees to be a mandatory subject of bargaining. *Beverly Health & Rehabilitation Services, Inc.*, 335 NLRB 635, 636 (2001); *Raven Government Services*, 331 NLRB 651 (2000); *Bentler Industries, Inc.*, 323 NLRB 712, 715 (1997).

I find that by unilaterally changing the scheduling of trainees in its E & U department, Respondent violated Section 8(a)(5) of the Act.

4. The failure to provide information

a. The April 2, 2014 request

Complaint paragraphs 13(c) and (d) allege that since April 9,

2014, Respondent has failed to provide the Union with documentation and from April 9 to June 13, 2014, it has unreasonably delayed in providing the information related to any wage increases given to employees, disciplinary actions, probationary actions, reassignment of employees, and disciplinary recommendations that are related to these interviews and evaluations that are now being conducted by the management team.

i. The facts

On April 2, 2014, after hearing that Alsemaan was making changes to the E & U department employees' evaluation process, Local 580 President Silvery wrote a letter to Zolotko asking Respondent to meet and bargain about the changes and requesting documentation regarding the changes.⁴⁰ Silvery's letter requested the following information:

[A]ll records, notes, emails, test results or other documentation related to any of the interviews and evaluations. Please make sure to also include documentation related to any wage increases given to employees, disciplinary actions, probationary actions, reassignment of employees and disciplinary recommendations that are related to these interviews and evaluations that are now being conducted by your management team by April 9, 2014, since the time you originally hired your new power plant manager.

On April 4, 2014, in response to Silvery's letter, Zolotko emailed⁴¹ union area representative Anderson stating that she did not understand Silvery's letter. The same day Anderson responded⁴² that it was quite clear that Silvery was asking Respondent to cease its unilateral changes to the qualification test in the E & U department and also provide Local 580 with information related to those changes. On April 8, 2014, Zolotko emailed⁴³ Anderson stating that the bargaining issue in the E & U department should be addressed by the parties' grievance procedure.

On June 13, 2014, Zolotko provided the standing committee with a response to Silvery's April 2, 2014 information request.⁴⁴ Zolotko's response consisted of an assortment of unidentified documents attached to it. Zolotko attached no cover letter to her submission explaining either what she was responding to or why she had not attached all of the responsive documents. A review of the attachments reveals that they included some E & U evaluation records, notes taken during evaluation interviews, and emails regarding the recent evaluations. Absent from the response were any documents related to any wage increases given to employees, disciplinary actions, probationary actions, reassignment of employees, and disciplinary recommendations related to the evaluation interviews. There is no dispute that Zolotko never provided these documents to Local 580, never informed Local 580 that these documents did not exist, and never presented Local 580 with a reason for failing to provide these documents. Zolotko testified that the information requested does not exist.

⁴⁰ GC Exh. 6.

⁴¹ GC Exh. 7, p. 2.

⁴² Ibid, p. 1.

⁴³ GC Exh. 8.

⁴⁴ GC Exh. 53.

³⁹ GC Exh. 45.

As the record makes clear, the only responsive documents that were provided 2-1/2 months after Silvery's initial request were unduly delayed and Respondent provided no reason for the delay.

ii. The analysis

General Counsel takes the position that Respondent was obligated to produce the information Silvery requested or to provide the Local 580 with a timely explanation for its refusal to provide the requested information, citing *USPS*, 332 NLRB 635, 636 (2000). It did not do so.

Respondent argues that it had no duty to produce information that it does not have, citing *Harmon Auto Glass*, 352 NLRB 152 (2008), and *Whittier Area Parents Assn.*, 296 NLRB 817 (1989). Respondent further contends that it did not engage in any unreasonable delay in furnishing requested information.

The Courts and Board since its inception have long held that an employer's duty to bargain includes, upon request, supplying the union with information necessary and relevant to fulfill its bargaining obligations. *NLRB v Acme Industrial Co.*, 385 U.S. 432, 435-436 (1967); *S.L. Allen & Co., Inc.*, 1 NLRB 714, 728 (1936); *Industrial Welding Co.*, 175 NLRB 477 (1969). Information that implicates terms and conditions of employment of bargaining unit employees is presumptively relevant. *Whitesell Corp.*, 355 NLRB 635 (2010); *CalMat Co.*, 331 NLRB 1084 (2000). Once it has been determined that the employer is under an obligation to produce the requested information, the employer is under an obligation to either produce the information or provide an explanation for its refusal to provide the requested information. An employer's failure to respond at all is likewise a violation of Section 8(a)(5) of the Act. *USPS*, 332 NLRB 635, 639 (2000).

Once the duty to provide information applies, an employer must produce the information in a timely manner. *Allegheny Power*, 339 NLRB 585, 587 (2003). While the Board looks to the totality of the circumstances in determining if the delay in furnishing information is unlawful, it has found a 7 week and 10 week delay unreasonable. *Woodland Clinic*, 331 NLRB 735, 737 (2001); *Bundy Corp.*, 292 NLRB 671, 672 (1989).

Here there is no dispute that the information Local 580 requested was presumptively relevant as it applied to terms and conditions of bargaining unit employees. Respondent did not furnish any of the information until June 13, 2014, over 10 weeks after it had been requested. Then much of the requested information, including documents related to wage increases, disciplinary actions, probationary actions, reassignment of employees, and disciplinary recommendations related to the evaluation interviews, was not provided. No explanation for either the delay in providing the information or the absence of the information was given until the hearing herein when Zolotko testified the information did not exist.

I find Respondent's citations to *Harmon Auto Glass*, 352 NLRB 152, 153 (2008), and *Whittier Area Parents Assn.*, 296 NLRB 817 fn. 2 (1989), inapposite. In neither *Harmon* nor *Whittier* was there an issue as to whether the employer failed to explain its failure to produce non-existent information.

Respondent was under an obligation to either produce the requested information in a timely manner or to explain its inability

to produce the information. It did neither. Moreover, I find that 10 weeks was an unreasonably long time to provide the information furnished, particularly considering the clarity of the request, the absence of evidence that it would be difficult to recover the information, and the absence of any explanation for Respondent's failure to act in a timelier manner. Accordingly, I find Respondent violated Section 8(a)(5) of the Act by failing to explain the absence of the requested information and by failing to provide the information furnished to the Union in a timely manner.

b. The April 24, 2014 request

Complaint paragraph 14(c) alleges that from about May 5 to about June 4, 2014, Respondent unreasonably delayed in furnishing the Union with information regarding Respondent's food safety training as set forth in Attachment A of the consolidated complaint.

i. The facts

On February 5, 2014, when Local 633 president Lovgren learned about the new hygiene rule changes, he sent superintendent of the paper machine area Tim Edwards (Edwards) an information request⁴⁵ about the new rules. In his letter Lovgren asked for the following information by February 18, 2014:

1. We need to know what the expected changes are,
2. We need to know the locations of the Hygiene zones are,
3. We need to know what locations of the Production zones are,
4. We need to know what are the changes to existing job duties and whose jobs will those effect,
5. Please include any check off sheets, or check off lists that will effect [sic]those jobs,
6. We need to know if there will be any special clothing requirements, i.e. clean clothes, uniforms?

Zolotko emailed⁴⁶ Lovgren back that day stating: "Did you attend the recent food safety ISO training? I believe the answers to your questions are there." After receiving Zolotko's response and hearing from Edwards that manager Mike Haas (Haas) was the appropriate person to whom to direct his request, Lovgren forwarded this same request to Haas on February 10, 2014.⁴⁷

On April 7, 2014, after receiving no response from Haas, Lovgren sent an email to Zolotko requesting the information once again. On April 8, Zolotko emailed Lovgren the training materials for the new food safety rules.⁴⁸ After reviewing the training materials, Lovgren created a list of questions about the hygiene rule changes and sent it to Zolotko on April 24, 2014.⁴⁹ In the April 24, 2014 information request, the Union made a list of 10 subjects regarding the new hygiene rules about which they had several questions in each subject. On June 4, 2014,

⁴⁵ GC Exh. 20.

⁴⁶ GC Exh. 21.

⁴⁷ GC Exh. 22.

⁴⁸ GC Exh. 23.

⁴⁹ GC Exh. 24.

Zolotko responded to Lovgren's inquiry.⁵⁰

ii. The analysis

General Counsel takes the position that Respondent failed to provide the information requested on April 24, 2014, in a timely manner. Respondent contends the information was provided in a timely manner under all of the circumstances.

As already noted, an employer has the duty under Section 8(a)(5) of the Act to provide the union with relevant information in a timely manner. *Shaw's Supermarkets, Inc.*, 332 NLRB 635 (2000); *Woodland Clinic*, 331 NLRB 735 (2001).

The information sought here was presumptively relevant as it deals with terms and conditions of employment. Lovgren requested specific information regarding the new food safety rules on April 24, 2014. Zolotko failed to provide Lovgren with any response until June 4, 2014, 6 weeks later.

A determination of the reasonableness of a delay in supplying relevant information requires a review of all the relevant circumstances, including "the complexity and extent of the information sought, its availability and the difficulty in retrieving the information." *Allegheny Power*, supra at 587. The Board has held the absence of evidence justifying an employer's delay in furnishing a union with relevant information, may justify finding a violation of Section 8(a)(5) of the Act. *Pennco, Inc.*, 212 NLRB 677, 678 (1974).

Here, the information sought was not complex but straightforward. Respondent presented no evidence that the information was unavailable or difficult to retrieve. Under these circumstances I find that a delay of 6 weeks in furnishing the requested information was unreasonable and therefore violated Section 8(a)(5) of the Act.

c. The April 30, 2014 request

Complaint paragraph 15(c) alleges that since about May 2, 2014, Respondent has failed to provide the Union with the exact cost and your justification for each of the costs in the bill and invoice you sent to Local 580 and 633 for bargaining related expenses; and explain in detail how you calculated the amounts that are contained in the invoices you sent to Locals 580 and 633.

i. The facts

At the beginning of bargaining, the parties agreed that Respondent would pay the bargaining unit employees for their time spent in bargaining sessions and the Locals would reimburse Respondent for that time. This agreement was not reduced to writing.

On April 8, 2014, after parties had met for some time in bargaining for the successor contracts, Local 633's president, Lovgren wrote an email⁵¹ to Respondent's payroll specialist, Sandra Swogger (Swogger), requesting that she send Local 633 an invoice for the hours that Respondent had paid for the bargaining committee members' bargaining time. Swogger sent Lovgren an invoice⁵² which provided lump-sum amounts due on behalf of each member of the bargaining committee. When

Lovgren received this information he sent another email⁵³ asking if something had been added. Swogger replied⁵⁴ that she used "a fully loaded rate." Finally on April 11, 2014, Lovgren emailed⁵⁵ Swogger and Zolotko and asked to see a break down on the uploaded rate and what it covered.

Zolotko sent Lovgren an email⁵⁶ reply stating that "... we are not creating special documents to satisfy your curiosity. We are paying the same way we paid for the Extruders." According to Lovgren, he needed this itemized information in order to understand how Respondent was billing the Union for the bargaining committee members' time and for the Local's financial records for tax purposes.

On April 15, 2014, Lovgren emailed⁵⁷ Zolotko again and asked her for a breakdown of Respondent's fully loaded rate. Receiving no response, Lovgren emailed⁵⁸ Zolotko again on April 24, 2014. On April 30, 2014, after still having received no response from Zolotko, Union AWPWW representative Anderson sent yet another letter⁵⁹ to Zolotko requesting, in pertinent part:

... a written description of how the company calculated the hourly rates that you have included in the 2 invoices you sent to Locals 580 and 633.

a. Please identify the exact cost of your justification for each of the costs in the bill and invoice you sent to our unions 580 and 633 for bargaining related expenses.

b. Please explain in detail how you calculated the amounts that are contained in the invoices you sent to Locals 580 and 633.

On May 19, 2014, Zolotko emailed⁶⁰ Lovgren payroll records for the employees who were on the bargaining committees for the specified time periods. That day, Zolotko sent an email⁶¹ to Lovgren stating: "I just sent you the bargain board payroll data. It seems redundant, since you all were at the bargain and you all have access to your payroll records ... so, collectively you've had this data all along."

The records Zolotko sent failed to reflect what the Locals were requesting, however, as there was no indication as to which benefits Respondent had added in calculating their "fully loaded" rate and/or how those benefits were calculated.

On June 5, 2014, Anderson emailed⁶² Zolotko expressing that the Locals still had not received the information requested stating:

It is my understanding that on the original bill the Union received, the Company was charging an amount that was greater than the hourly rates of the bargaining board members. When the Union asked the Company why this was, they were told that they were "uploaded rates." The Union has asked for

⁵⁰ GC Exh. 25.

⁵¹ GC Exh. 9, p. 4.

⁵² GC Exh. 10.

⁵³ GC Exh. 9, p. 3.

⁵⁴ Ibid. at p. 2.

⁵⁵ Ibid. at p. 1.

⁵⁶ Ibid. at p. 1.

⁵⁷ GC Exh. 11.

⁵⁸ GC Exh. 12.

⁵⁹ GC Exh. 14.

⁶⁰ GC Exh. 15.

⁶¹ GC Exh. 16.

⁶² GC Exh. 17.

an itemized bill breaking down just what these uploaded rates were comprised of. Diana has refused to give the Union this information, only stating that this was how the Company charged the Union during Extruder bargaining.

Zolotko responded⁶³ that she had sent employee paystubs to Lovgren.

On August 15, and 18, 2014, Lovgren again emailed⁶⁴ Zolotko explaining that the payroll records did not break down the amount taken into consideration by Respondent in coming up with its lump-sum amounts and he renewed his request for the information yet again.

On September 18, 2014, Respondent finally provided the breakdown of what was included in the “fully loaded” rate.⁶⁵

ii. The analysis

General Counsel argues that Respondent unreasonably delayed in furnishing relevant information to the Union. Respondent contends that the issue is moot since Respondent ultimately furnished the requested information.

An employer is under an obligation to furnish a union with relevant information necessary for the performance of the union's duties in representing the unit employees and for administration of a collective-bargaining agreement. *NLRB v. Acme Indus. Co.*, 385 U.S. 432 (1967); *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956); *Safeway Stores*, 252 NLRB 1323 (1980); *Westinghouse Electric Corp.*, 239 NLRB 106, 107 (1978). The standard for determining the relevance of information sought by a bargaining agent in conjunction with administration of a collective-bargaining agreement was set forth in *Westinghouse*:

It is well established that a labor organization, obligated to represent employees in a bargaining unit with respect to their terms and conditions of employment, is entitled to such information from the employer as may be relevant and reasonably necessary to the proper execution of that obligation. The right to such information exists not only for the purpose of negotiating a contract, but also for the purpose of administering a collective-bargaining agreement. The employer's obligation, in either instance, is predicated upon the need of the union for such information in order to provide intelligent representation of the employees. The test of the union's need for such information is simply a showing of “probability that the desired information was relevant, and that it would be of use to the union in carrying out its statutory duties and responsibilities.” The union need not demonstrate that the information sought is certainly relevant or clearly dispositive of the basic negotiating or arbitration issues between the parties. The fact that the information is of probable or potential relevance is sufficient to give rise to an obligation on the part of an employer to provide it. The appropriate standard in determining the potential relevance of information sought in aid of the bargaining agent's responsibility is a liberal discovery-type standard. *Id.* at 107

Here Local 633 sought an explanation of the invoice Re-

spondent had provided for Local 633 to reimburse Respondent for bargaining unit members pay during bargaining time. While Respondent does not contest the relevancy of this information, I find the information sought here was relevant not only to the Union's administration of its oral agreement with Respondent for reimbursement of its members' bargaining pay but also for its ability to negotiate the parties' successor collective-bargaining agreement. The oral agreement was established to facilitate the Local 633 bargaining committee members' pay during bargaining sessions and thus was of benefit to Local 633 in engaging in bargaining for a successor contract with Respondent. Local 633 requested information to ensure the appropriate amount of money for bargaining committee members had been included in Respondent's invoice for the Union's reimbursement, per the parties' agreement. While Zolotko claimed in her email that the information could be ascertained from the bargaining committee members' paystubs, the exact breakdown of the lump-sum amounts set forth in Respondent's invoice, including which employee benefits were included, could not be established from general paystub information provided.

Thus, Respondent failed to provide the Locals with the breakdown of those numbers until after the complaint issued herein 20 weeks after the information was requested. No explanation was offered as to why Respondent failed to produce the requested information for 20 weeks. Respondent's sole defense is that it ultimately gave the information to the Union. Under these circumstances I find that Respondent's failure to provide the requested information until September 18, 2014, was an unreasonable delay and violated its duty to provide the Locals with information in violation of Section 8(a)(5) of the Act.

d. The May 1, 2014 request

Complaint paragraph 16(a) alleges that since about May 1, 2014, the Union has requested the following information of Respondent: (i) The questions asked at the fact finding; (ii) The answers as recorded by Dave Kay and Bob Montgomery at the fact finding; (iii) The reasons for these questions; (iv) Emails about this incident; (v) A list of all complaints against Rick Olsen; and (vi) Who complained—what was said and personal notes/conversations about the incident.

Complaint paragraph 16(c) alleges that since about May 8, 2014, Respondent has failed and refused to furnish the Union with (iii) The reasons for these questions; (iv) Emails about this incident; (v) A list of all complaints against Rick Olsen.

Complaint paragraph 16(d) alleges that from May 8, 2014, to about June 5, 2014, Respondent unreasonably delayed in furnishing the Union with (i) The questions asked at the fact finding; (ii) The answers as recorded by Dave Kay and Bob Montgomery at the fact finding; (vi) Who complained—what was said and Personal notes/conversations about the incident.

i. The facts

On April 28, 2014, Local 580 Shop Steward Mike Mirenta (Mirenta) participated in a fact finding meeting, representing E & I Tech Rick Olson (Olson). Central services Superintendent Kay and TDM Bob Montgomery (Montgomery) were also present during the meeting. During the meeting, Kay asked

⁶³ *Ibid.*

⁶⁴ GC Exh. 18.

⁶⁵ GC Exh. 19.

Olson a series of questions about a call that he received while he was on duty in the power house. At the end of the meeting, Mirenta asked Kay who had made the complaint about employee Olson. Kay replied that Mirenta would have to ask the human resources department for that information. Mirenta also asked for a copy of the questions that Kay had asked Olson during the fact finding as well as any notes of Olson's responses made during the interview. Again Kay said that Mirenta would have to go through human resources to get that information.

After the meeting Mirenta went to the human resources office to follow up on his information requests. Mirenta asked Zolotko if he needed to fill out a specific form in order to make an information request. Zolotko told Mirenta that if he wanted the form, he could get one from Local 580. When Mirenta asked Zolotko if he could send her an email asking for the information, Zolotko replied that she did not think an email would work.

Later Mirenta spoke with Local 580 President Silvery, who told Mirenta that email was an appropriate way to make an information request. On May 1, 2014, Mirenta emailed⁶⁶ Zolotko an information request for the following information regarding the Olson fact finding:

The questions asked at the fact finding; The answers as recorded by Dave Kay & Bob Montgomery at the fact finding; The reasons for these questions; E-mails about this incident; List all the complaints against Rick Olson; Who complained; What was said Personal notes/conversations about the incident

On June 5, 2014, Zolotko responded⁶⁷ to Mirenta's information request. Zolotko attached two sets of fact finding notes for Olson and James Pruitt to an email sent to the Local 580 Standing Committee with a copy to Mirenta.⁶⁸ Zolotko failed to provide the reasons behind the questions asked in Olson's fact finding, emails about the incident, or complaints against Olson. It is undisputed that Zolotko never provided the requested items, never told Local 580 that the information requested did not exist, and never explained why she was not providing Local 580 with the requested information.

In its brief Respondent contends that the investigation into Olson's conduct had not been completed at the time of Mirenta's request and on June 5, 2014, when the investigation was completed, it responded to the information request and provided all available documents.

ii. The analysis

General Counsel takes the position that Respondent unreasonably delayed in furnishing and refused to furnish requested information. Respondent argues the investigation was not completed until June 5, 2014, and that it provided all available documents.

The Union requested information concerning a fact finding regarding a bargaining unit member that could lead to discipline and ultimately a grievance. The information requested

was therefore presumptively relevant. *Island Creek Coal Co.*, 292 NLRB 480, 487 (1989). Zolotko provided some of the requested materials, two sets of fact finding notes, 5 weeks after the initial request on June 5, 2014. There is no evidence that the fact finding notes were difficult to obtain. In its June 5, 2014 partial production⁶⁹ of information, Respondent asserted that "Our investigation is now complete." In its brief Respondent asserts that, when the investigation was completed, it responded to the information request and provided all available documents. However, the record is devoid of any evidence as to when Respondent completed its investigation or that this in some way absolved it of its duty to furnish the requested information before June 5. Further there is no record evidence that there was no other information responsive to the May 1 information request or that Respondent ever so notified the Union.

Under all of the circumstances, including the clarity and lack of complexity of the request, the relative ease of recovering the information and the absence of a rationale for the delay in providing the requested information, I conclude that Respondent unreasonably delayed in providing the information for over 5 weeks and thereby violated section 8(a)(5) of the Act. *Shaw's Supermarkets, Inc.*, 339 NLRB 871 (2003); *USPS*, 332 NLRB 635, 638 (2000); *Overnight Transportation Co.*, 330 NLRB 1275 (2000).

Further, Respondent's failure to provide all of the information in the May 1 information request violates Section 8(a)(5) of the Act. Respondent's bare assertion in its brief that it provided all available documents is insufficient explanation for its failure to provide the requested documents. By failing to provide all of the requested documents and by failing to inform the Union in a timely manner that it had no further documents, Respondent violated Section 8(a)(5) of the Act. *USPS*, 332 NLRB 635, 639 (2000).

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The evidence having established that the Respondent suspended its employee Steve Collins, my recommended order requires the Respondent to make him whole without loss of seniority and other privileges previously enjoyed, and to make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him. My recommended order further requires that backpay shall be computed in accordance with *F.W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons*, 283 NLRB 1173 (1987), plus daily compound interest as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

The recommended Order also requires that the Respondent shall expunge from its files and records any and all references to the unlawful suspension and to notify Collins in writing that this has been done and that the unlawful discrimination will not be used against him in any way. *Sterling Sugars, Inc.*, 261 NLRB 472 (1982). Further, the Respondent must not make any

⁶⁶ GC Exh. 50.

⁶⁷ GC Exh. 51.

⁶⁸ GC Exh. 52.

⁶⁹ Ibid.

reference to the expunged material in response to any inquiry from any employer, employment agency, unemployment insurance office, or reference seeker, or use the expunged material against them in any other way.

The Respondent shall be required to post a notice that assures its employees that it will respect their rights under the Act. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. *J. Picini Flooring*, 356 NLRB 6 (2010).

The Board has held that discriminatees be reimbursed for any excess taxes owed as a result of a lump-sum backpay award and that Respondent be ordered to complete the appropriate paperwork as set forth in IRS Publication 975 to notify the Social Security Administration what periods to which the backpay should be allocated as requested in the remedy section of the complaint herein.

In *Don Chavas LLC d/b/a Tortillas Dan Chavas*, 361 NLRB 101 (2014), Board ordered that it will routinely require the filing of a report with the Social Security Administration allocating backpay awards to the appropriate calendar quarters. The Board also held that it will routinely require respondents to compensate employees for the adverse tax consequences of receiving one or more lump-sum backpay awards covering periods longer than 1 year. The Board concluded that it is the General Counsel's burden to prove and quantify the extent of any adverse tax consequences resulting from the lump-sum backpay award and that such matters shall be resolved in compliance proceedings.

Pursuant to *Tortillas Dan Chavas* supra, I will order that Respondent shall file a report with the Social Security Administration allocating any backpay awards to the appropriate calendar quarters.

CONCLUSIONS OF LAW

1. Respondent Weyerhaeuser Company is an employer engaged in commerce and in an industry affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Association of Western Pulp and Paper Workers, affiliated with the United Brotherhood of Carpenters and Joiners of America (AWPPA) and its Locals 580 and 633 (Unions) are labor organizations within the meaning of Section 2(5) of the Act and are the exclusive collective bargaining representative of Respondent's employees in the following appropriate collective bargaining units:

Local 633 represents a unit of Respondent's 75 extruders (extruder unit) including:

All employees of Respondent at its Longview, Washington extruder operation, except those employees engaged in administration, actual supervision, watchman duties, sales, engineering and drafting, research and technical occupations requiring professional training, accounting, office clerical and guards, supervisors, and professional employees as defined in the Act.

Local 633 also represents a unit of Respondent's 125 paperboard employees (paperboard unit) including:

All employees of Respondent working in its paperboard, shipping, L 3 paper machine, and L 3 technical departments at its Longview facility, except those engaged in administration, actual supervision, watchman duties, sales, engineering and drafting, research and technical occupations requiring professional training, accounting, clerical, stenographic and other clerical work. Also excluded are guards, supervisors, and professional employees as defined in the Act.

Local 580 represents a unit of Respondent's 250 energy and utility, maintenance, fiberline, and chip processing employees (Local 580 unit) including:

All employees of Respondent at its Longview facility, except those employees in Respondents extruder, paperboard, shipping, L 3 paper machine, L 3 technical departments, and those employees engaged in administration, actual supervision, watchman duties, sales, engineering and drafting, research and technical occupations requiring professional training, accounting, stenographic and other clerical work. Also excluded are guards, supervisors, and professional employees as defined in the Act.

3. By engaging in the following conduct, the Respondent committed unfair labor practices in violation of Section 8(a)(5) and (1) of the Act:

(a) Refusing to recognize and bargain in good faith with Association of Western Pulp and Paper Workers, affiliated with the United Brotherhood of Carpenters and Joiners of America (AWPPA) and its Locals 580 and 633 (Unions), the exclusive collective-bargaining representative of its employees in the following collective-bargaining units:

The Local 633 unit of Respondent's 75 extruders (extruder unit) including:

All employees of Respondent at its Longview, Washington extruder operation, except those employees engaged in administration, actual supervision, watchman duties, sales, engineering and drafting, research and technical occupations requiring professional training, accounting, office clerical and guards, supervisors, and professional employees as defined in the Act.

The Local 633 unit of Respondent's 125 paperboard employees (paperboard unit) including:

All employees of Respondent working in its paperboard, shipping, L 3 paper machine, and L 3 technical departments at its Longview facility, except those engaged in administration, actual supervision, watchman duties, sales, engineering and drafting, research and technical occupations requiring professional training, accounting, clerical, stenographic and other clerical work. Also excluded are guards, supervisors, and professional employees as defined in the Act.

The Local 580 unit of Respondent's 250 energy and utility, maintenance, fiberline and chip processing employees (Local 580 unit) including:

All employees of Respondent at its Longview facility, except those employees in Respondents extruder, paperboard, ship-

ping, L 3 paper machine, L 3 technical departments, and those employees engaged in administration, actual supervision, watchman duties, sales, engineering and drafting, research and technical occupations requiring professional training, accounting, stenographic and other clerical work. Also excluded are guards, supervisors, and professional employees as defined in the Act.

(b) Unilaterally implementing food safety rules without notice to or bargaining with the Unions.

(c) Unilaterally implementing new evaluation processes for the E & U department employees without notice to or bargaining with the Unions.

(d) Unilaterally changing the hours of E & U department employees without notice to or bargaining with the Unions.

(e) Refusing to provide and unreasonably delaying in providing the Unions with information relevant and necessary to its function as collective-bargaining representative of bargaining unit employees.

4. By engaging in the following conduct, the Respondent committed unfair labor practices in violation of Section 8(a)(1) of the Act.

(a) Suspending Steve Collins because he exercise his right to bring issues and complaints to Respondent on behalf of himself and other employees.

(b) Denying Steve Collins and Joyce Becker their right to effective union representation in an interview that could reasonably lead to discipline by telling the representative to remain silent.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁷⁰

ORDER

Respondent, Weyerhaeuser Company, located in Federal Way, Washington, and with a facility located in Longview, Washington, its officers, agents, successors, and assigns shall:

1. Cease and desist from

(a) Refusing to recognize and bargain in good faith with Association of Western Pulp and Paper Workers, affiliated with the United Brotherhood of Carpenters and Joiners of America (AWPPA) and its Locals 580 and 633 (Unions), the exclusive collective-bargaining representative of its employees in the following collective bargaining units:

The Local 633 unit of Respondent's 75 extruders (extruder unit) including:

All employees of Respondent at its Longview, Washington extruder operation, except those employees engaged in administration, actual supervision, watchman duties, sales, engineering and drafting, research and technical occupations requiring professional training, accounting, office clerical and guards, supervisors, and professional employees as defined in the Act.

The Local 633 unit of Respondent's 125 paperboard employees (paperboard unit) including:

All employees of Respondent working in its paperboard, shipping, L 3 paper machine, and L 3 technical departments at its Longview facility, except those engaged in administration, actual supervision, watchman duties, sales, engineering and drafting, research and technical occupations requiring professional training, accounting, clerical, stenographic and other clerical work. Also excluded are guards, supervisors, and professional employees as defined in the Act.

The Local 580 unit of Respondent's 250 energy and utility, maintenance, fiberline and chip processing employees (Local 580 unit) including:

All employees of Respondent at its Longview facility, except those employees in Respondents extruder, paperboard, shipping, L 3 paper machine, L 3 technical departments, and those employees engaged in administration, actual supervision, watchman duties, sales, engineering and drafting, research and technical occupations requiring professional training, accounting, stenographic and other clerical work. Also excluded are guards, supervisors, and professional employees as defined in the Act.

(b) Unilaterally implementing food safety rules without notice to or bargaining with the Unions.

(c) Unilaterally implementing new evaluation processes for the E & U department employees without notice to or bargaining with the Unions.

(d) Unilaterally changing the hours of E & U department employees without notice to or bargaining with the Unions.

(e) Refusing to provide and unreasonably delaying in providing the Unions with information relevant and necessary to its function as collective-bargaining representative of bargaining unit employees.

(f) Suspending you because you exercise your right to bring issues and complaints to us on behalf of yourself and other employees.

(g) Denying your right to effective union representation in an interview that could reasonably lead to discipline by telling the representative to remain silent.

(h) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) The Respondent shall be required to post a notice that assures its employees that it will respect their rights under the Act. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. *J. Picini Flooring*, 356 NLRB 6 (2010).

(b) Provide AWPPW Locals 580 and 633 with the information they requested on April 2, 24, and 30, 2014.

(c) Make Steve Collins whole for any loss of earnings and other benefits suffered as a result of his suspension, less any net interim earnings, plus interest.

⁷⁰ If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board and all objections shall be waived for all purposes.

(d) Remove from our files all references to the discipline of Steve Collins and notify him in writing that this has been done and that the suspension will not be used against him in any way.

(e) Provide the AWPPW Locals 580 and 633 with the information they requested on April 2, 24, and 30, 2014, and May 1, 2014.

(f) Upon the request of AWPPW Local 580, rescind any or all changes to your terms and conditions of employment that we made without first bargaining with the Union, including changes made to the way we conduct training evaluations (also known as "qualification reviews") and changes to our trainees' work schedules.

(g) Upon request of AWPPW Local 580 and/or AWPPW Local 633, rescind any or all changes to your terms and conditions of employment that we made without first bargaining with the Union, including the new food safety rules implemented in January and February 2014 at our Longview facility.

(h) Restore our training evaluation/qualification review system for our Energy and Utility employees to as it was prior to October 2013.

(i) Arrange for any Energy and Utility employees who are currently in the process of going through such evaluations/qualification reviews to be interviewed, evaluated, and promoted under our evaluation process in place prior to October 2013.

(j) Pay employees for the wages and other benefits lost because of the changes to terms and conditions of employment that we made without bargaining with AWPPW Local 580 and/or AWPPW 633.

(k) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(l) Within 14 days after service by the Region, post at facilities in Longview, Washington copies of the attached notice marked "Appendix."⁷¹ Copies of the notice, on forms provided by the Regional Director for Region 19 after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event

that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 10, 2013.

(m) Within 21 days after service by the Region, filed with the Regional Director for Region 19 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

Dated, Washington, D.C. March 25, 2015

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

After a trial at which we appeared, argued, and presented evidence, the National Labor Relations Board has found that we violated the National Labor Relations Act and has directed us to post this notice to employees and to abide by its terms.

Accordingly, we give our employees the following assurances:

WE WILL NOT refuse to recognize and bargain with the Association of Western Pulp and Paper Workers Union, affiliated with the United Brotherhood of Carpenters and Joiners of America, Local 580 ("AWPPW Local 580"), as the exclusive representative of our employees in the following appropriate unit ("580 Unit"):

All our employees working in our Longview facility, except those employees in our extruder, paperboard, shipping, L 3 paper machine, and L 3 technical departments, and those employees engaged in administration, actual supervision, watchman duties, sales, engineering and drafting, research and technical occupations requiring professional training, accounting, clerical, stenographic and other office work. Also excluded are guards, supervisors, and professional employees as defined in the Act.

WE WILL NOT refuse to recognize and bargain with the Association of Western Pulp and Paper Workers Union, affiliated with the United Brotherhood of Carpenters and Joiners of America, Local 633 (the "AWPPW Local 633"), as the exclusive representative of our employees in the following appropriate unit ("Paperboard Unit"):

⁷¹ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

All our employees working in its paperboard, shipping, L 3 paper machine, and L 3 technical departments at our Longview facility, except those engaged in administration, actual supervision, watchman duties, sales, engineering and drafting, research and technical occupations requiring professional training, accounting, clerical, stenographic, and other clerical work.

Also excluded are guards, supervisors, and professional employees as defined in the Act.

WE WILL NOT refuse to recognize and bargain with the AWPPW Local 633, as the exclusive representative of our employees in the following appropriate unit ("Extruder Unit"):

All our employees at our Longview, Washington extruder operation, except those employees engaged in administration, actual supervision, watchman duties, sales, engineering and drafting, research and technical occupations requiring professional training, accounting, office clerical and guards, supervisors, and professional employees as defined in the Act.

YOU HAVE THE RIGHT to freely bring issues and complaints to us on behalf of yourself and other employees and WE WILL NOT do anything to interfere with your exercise of that right.

WE WILL NOT suspend you because you exercise your right to bring issues and complaints to us on behalf of yourself and other employees.

WE WILL NOT deny employees effective union representation at fact finding interviews that could reasonably lead to discipline by telling the representatives to be silent.

WE WILL NOT unreasonably delay in providing AWPPW Locals 580 and 633 with information that is relevant and necessary to its role as your bargaining representative.

WE WILL NOT refuse to provide AWPPW Locals 580 and 633 with information that is relevant and necessary to its role as your bargaining representative.

WE WILL NOT refuse to meet and discuss in good faith with AWPPW Locals 580 and 633 any proposed changes in your wages, hours and working conditions before putting such changes into effect.

WE WILL NOT remove union fliers from facility bulletin boards designated for use by AWPPW Locals 580 and 633.

WE WILL NOT in any like or related manner interfere with your rights under Section 7 of the Act

WE WILL provide AWPPW Locals 580 and 633 with the information they requested on April 2, 24, and 30, 2014.

WE WILL pay Steve Collins for the wages and other benefits he lost because we disciplined him.

WE WILL remove from our files all references to the discipline of Steve Collins and WE WILL notify him in writing that this has been done and that the suspension will not be used against him in any way.

WE HAVE provided the AWPPW Locals 580 and 633 with the information they requested on April 24 and 30, 2014.

WE WILL provide the AWPPW Locals 580 and 633 with all of the information they requested on April 2, 2014, and May 1, 2014.

WE WILL, if requested by AWPPW Local 580, rescind any or all changes to your terms and conditions of employment that we made without first bargaining with the Union, including

changes made to the way we conduct training evaluations (also known as "qualification reviews") and changes to our trainees' work schedules.

WE WILL, if requested by AWPPW Local 580 and/or AWPPW Local 633, rescind any or all changes to your terms and conditions of employment that we made without first bargaining with the Union, including the new food safety rules implemented in January and February 2014 at our Longview facility.

WE WILL restore our training evaluation/qualification review system for our Energy and Utility employees to as it was prior to October 2013.

WE WILL, arrange for any Energy and Utility employees who are currently in the process of going through such evaluations/qualification reviews to be interviewed, evaluated, and promoted under our evaluation process in place prior to October 2013.

WE WILL pay employees for the wages and other benefits lost because of the changes to terms and conditions of employment that we made without bargaining with AWPPW Local 580 and/or AWPPW 633.

WEYERHAEUSER CORP.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/19-CA-122853 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.

